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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 380.

THE KANSAS PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 10, 1881.

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Statement of exhibits to bill	12	5
Exhibit A—Lands south of base line and east of sixth principal meridian, &c.	12	6
Exhibit B—Lands south of base line and east of sixth principal meridian, &c.	14	7
Exhibit C—Letter of Henry Beard, att'y for Kan. Pac. R. R. Co., April 30, 1872, to Com'r Gen'l Land Office, stating grounds of appeal, &c	14	7
Security for costs	17	8
Subpœna	18	9
Marshal's return	19	9
Appearance of defendant	21	10
Leave to file answer granted	21	10
Answer	21½	11
Replication	33	16
Stipulation for continuance	35	16
Cause continued	36	17
Stipulation for further continuance	37	17
Cause continued	38	18
Leave to amend bill granted	39	18
Cause continued	39	19

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Answer as amended refiled	39	19
Cause continued	40	19
Opinion	40	19
Agreed statement of facts	49	23
Exhibit A—Copies of letters and orders certified by Com'r Gen'l Land Office, June 2, 1879	62	28
Certificate of Com'r	62	29
Letter from Kansas delegation in Congress to Secretary of Interior, March 4, 1863	63	29
Letter of Com'r Gen'l Land Office to register and rec'r, Humbolt, Kan., March 19, 1863	63	29
Letter of Sec'y of Interior to Com'r Gen'l Land Office, April 20, 1803	68	31
Decision of Com'r Gen'l Land Office addressed to N. S. Goss, March 8, 1872	68	31
Letter of Henry Beard, att'y for K. P. R. R. Co., to Com'r Gen'l Land Office, April 30, 1872	71	33
Letter of Sec'y of Interior to Com'r Gen'l Land Office, Feb. 12, 1873	74	34
Decree	75	34
Allowance of appeal	76	35
Bond	77	35
Clerk's certificate	79	35

1 In the Circuit Court of the United States for the District of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY. } 1708.

Be it remembered that on this day, to wit, October 11, 1876, the complainant, by its solicitor, filed in the clerk's office of said court its bill of complaint, and security for costs, in said entitled suit, which said bill of complaint and security for costs are in the words and figures following, to wit:

In the Circuit Court of the United States, District of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant. } Bill in Equity.

To the judges of the circuit court of the United States for the district of Kansas:

2 The Kansas Pacific Railway Company brings this its bill of complaint against the Atchison, Topeka and Santa Fe Railway Company, and thereupon your orator complains and shows to the court—

I. The plaintiff and defendant are railroad corporations, incorporated by, and citizens of, the State of Kansas, but the matters in controversy in this action arise exclusively under the laws of the United States, and the matters in dispute exceed in value the sum of five hundred dollars, being the ownership of 5,029 acres of land, of the value of $20,000 or thereabouts, which lands are described and specified in schedules made Exhibits "A" and "B" hereto.

II. The complainant is a corporation, incorporated by an act of the Legislature of the Territory of Kansas, passed A. D. 1855, and entitled "An act to incorporate the Leavenworth, Pawnee and Western Railroad Company," and the name of which has since been duly changed, first, to the Union Pacific Railway Company, Eastern Division, and then to the Kansas Pacific Railway Company.

III. The defendant is a railroad corporation, incorporated by the Legislature of Kansas, entitled "An act incorporating the Atchison and Topeka Railroad Company," approved February 11,
3 1859, and which claims to have legally assumed, and is now known by, the name of the Atchison, Topeka and Santa Fe Railroad Company.

IV. The complainant claims to be entitled to the lands in controversy under and by virtue of an act of Congress passed July 1st, 1862, and the amenement thereof of July 2nd, 1864, and entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes."

V. The defendant claims to be entitled to the lands in controversy under and by virtue of an act of Congress, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraph lines in said State," approved March 3rd, 1863.

VI. On the 25th day of February, A. D. 1873, B. R. Cowen, Acting Secretary of the Interior, over the objection of complainant, certified said lands, specified in the schedule made Exhibit "A" hereto, to the State of Kansas, in pursuance of the last-mentioned act, and on March 31st, 1873, in like manner certified said lands comprised in the schedule made Exhibit "B" hereto.

VII. On the 29th day of March, A. D. 1873, the proper
4 officers of the State of Kansas executed to defendant a patent, which, among other lands, included said lands specified in schedule made Exhibit "A" hereto, and on May 19, A. D. 1873, a second patent, including, among other lands, the lands specified in schedule made Exhibit "B" hereto.

VIII. The Secretary of the Interior acted under a misapprehension of the law applicable to the facts before him in certifying said lands to the State of Kansas, and ought to have refused such certification and directed such lands to have been patented to the complainant.

IX. The facts submitted to said Secretary of the Interior, so far as relevant to the controversy between the parties hereto, are hereinafter fully set forth.

X. Said Secretary acted under a misapprehension of the law in the following specific particulars, namely:

First. The facts submitted to him show, as a matter of law, that the lands in controversy were reserved by the United States for the benefit of complainant before the line of defendant's railroad was definitely fixed.

Second. Such facts showed, as matters of law, that complainant had, by full compliance with the provisions and conditions of said act of July 2nd, 1864, become absolutely entitled to said lands
5 before the State of Kansas had complied with the provisions and conditions so as to entitle it to acquire the lands therein referred to.

Third. Such facts further showed as matter of law that the lands in controversy should have been patented to the complainant and not certified to the State of Kansas.

XI. The lands in controversy are situated in the counties of Waubaunsee and Osage, between the fifteen and twenty mile limits south of complainant's railroad, as actually located and constructed, and between the 72nd and 96th mile posts thereof west of the Missouri river, and to the west of defendant's railroad, partly within ten miles west therefrom and partly within the ten and twenty mile limit west therefrom, as actually located and constructed, except those in township 13 south, of range 11 east, which are more than twenty miles from defendant's railroad, as actually constructed.

XII. On the 23d day of December, 1862, the Kansas Pacific Railway Company filed in the Department of the Interior its acceptance

of the act of Congress of July 1st, 1862, to which the act of July 2d, 1864, above specified, is amendatory, and on July 17th, 1862, filed a map of location of its road, which location, so far as regards the road between the 72nd and 96th mile posts, was the final
6 location thereof upon which the railroad was afterwards actually constructed, and thereupon the odd-numbered sections of land within fifteen miles of the road so located were withdrawn for the benefit of complainant, but such withdrawal did not cover any of the land in controversy.

XIV. Early in 1865 the complainant commenced the actual construction of its road, and the first section thereof of forty miles from the Missouri river was completed and accepted by the President of the United States on June 19th, 1865, and the second section of twenty-two miles on the 20th day of December, 1865.

XV. On the 10th day of January, 1866, the complainant company filed another map of the location of its railroad, showing by flag staffs marked thereon and the certificates and affidavits annexed thereto the dates of the actual location of the various parts thereof. Such map and documents showed a location of the road from the 72nd to the 80th mile post between March 7th and 22nd, 1864, and from the 80th to the 96th mile post between January 27th, 1865, and February 3rd, 1865, and on February 5th, 1866, the same was approved by the Commissioner of the General Land Office, and by instructions, dated February 16th, 1886, the lands between the 20th and 25th miles from complainant's railroad were restored
7 to the public lands, and the odd-numbered sections of land within twenty miles of complainant's railroad were absolutely withdrawn from sale, and reserved for the use of complainant.

XVI. On the 8th day of May, 1866, the third section of complainant's railroad of twenty-three miles was completed and accepted by the President of the United States, and on the 7th of July, 1866, the fourth section of twenty miles was similarly accepted.

XVII. On the 30th day of November, 1870, the complainant tendered the fees payable to the register and receiver of the land office at Topeka, and on November 29th, 1870, duly deposited and tendered the costs of survey to the surveyor general of Kansas, and requested that a patent might issue to it for the lands in controversy, and complainant charges and avers that by the completion and acceptance as aforesaid, and tender of such costs and fees, it had become absolutely entitled to the immediate issue of a patent for said lands; nevertheless, said register and receiver, under instructions from the Commissioner of the General Land Office, refused to receive said costs and fees, on the ground that the State of Kansas, for the use of defendant and not the complainant, was entitled to said lands.

8 XVIII. Complainant appealed from such instructions of the Commissioner of the General Land Office to the Secretary of the Interior, and the grounds of such appeal are shown in the letter or statement of appeal made Exhibit *Exhibit* "C" hereto, and said Secretary, after hearing the evidence and arguments adduced by the parties hereto, rendered his decision in favor of defendant,

and ordered said lands to be certified to the State of Kansas for defendant's use.

XIX. On the 20th day of April, 1863, a withdrawal of lands for the use of the State of Kansas was ordered in pursuance of the provisions of the act of March 3d, 1863, and part of such withdrawal was to aid in the construction of a railroad from Atchison *via* Topeka to the western line of Kansas, in the direction of Fort Union and Santa Fe, as by said act provided; and such withdrawal was made in anticipated location of such railroad direct southwest from Topeka and much to the westward of the actual location of the railroad of defendant, and entirely different therefrom, and such withdrawal was not founded on any request or action of the State of Kansas, nor did said State file or present any map or statement of the intended location of the railroad projected, and complain-
9 ant submits that such withdrawal was wholly unauthorized and void.

XX. By act of February 9th, 1864, the Legislature of Kansas accepted the provisions of said act of Congress of March 3d, 1863, and assigned the lands granted in aid of the construction of a railroad from Atchison *via* Topeka to the west line of the State, as aforesaid, to the defendant company, and said company filed an acceptance of said act of the Legislature of Kansas on the 4th day of August, 1864.

XXI. A map, purporting to be a map of the general route of defendant company, was filed by its president with the Commissioner of the General Land Office on December 8th, 1866, but such general route was neither approved by the authorities of the State of Kansas, nor is it the route on which defendant's railroad is actually constructed.

XXII. Another map, purporting to be a final map of location between Topeka and Emporia was filed in the General Land Office on October 6th, 1868, but such location was neither approved by the authorities of the State of Kansas, nor is it the location on which defendant's railroad is actually constructed.

XXIII. A third map, purporting to be a copy of a map of the location of defendant's road between Topeka and Emporia,
10 filed with, and approved of, by the authorities of the State of Kansas, was filed in the General Land Office in 1870, and this map first shows the location on which defendant's railroad is actually constructed.

XXIV. The line of defendant's railroad was not staked out and plainly located on the route on which it is actually constructed, between Topeka and Emporia, until some time in 1870, nor was the initial part of its railroad between Topeka and Atchison constructed until some time in 1873.

XXV. Said defendant company did not file with the secretary of State of Kansas, as required by said act of February 9th, 1864, to do within one year after definite location, a map thereof until the 27th day of December, 1870, when it filed a map of definite location between Topeka and Emporia, and the route of such location

is altogether different from the anticipated route for which withdrawal was made on April 20th, 1863.

Wherefore complainant, being remediless at common law, prays that a writ of subpœna may issue out of this honorable court requiring the defendant to appear and answer in the premises and abide the order of this court.

And complainant further prays that a writ of injunction
11 may issue against the defendant restraining defendant, its officers, agents, and servants from selling, conveying, mortgaging, or otherwise alienating or encumbering said lands specified in the schedules hereto pending the prosecution of this suit.

And complainant prays that on a final hearing of this cause it may be decreed and adjudged that the officers of the United States should have patented said lands to complainant, and not have certified the same to the State of Kansas, for the use of the defendant. And that whatever estate, right, or interest in said lands specified in the schedules hereto may be vested in the defendant by said patents from the State of Kansas, is held by said defendant on trust for said complainant.

That defendant release and convey to complainant all its right, title, claim, and interest in or to said lands specified and described in the schedules hereto, or, in default thereof, that such release and conveyance be made by a commissioner appointed by this court, instead of and with like effect, as if made by defendant.

And that complainant may have such other and further relief as may be equitable, and that the defendant pay the costs of this suit.

12 And the complainant will ever pray, *et cetera.*

J. P. USHER,
Solicitor for Complainant.
C. S. BRETHERTON,
Of Counsel.

Exhibits to foregoing Bill.

A. Lands between ten and twenty miles from defendant's railway.
B. Lands between ten miles from defendant's railway and railway.
C. Grounds of appeal from Commissioner of General Land Office to Secretary of Interior.

Exhibit A.

Lands south of base line and east of sixth principal meridian, Kansas, certified to the State of Kansas for the benefit of the Atchison, Topeka and Santa Fe Railroad Company, February 25th, 1873,—Topeka District.

Part of Section.	Section.	Town. S.	Range E.	Acres.
S. W. of S. E. of	5	14	13	40
S. W. of S. W. of	"	"	"	40
13				
W. ½ of S. W. of	7	14	13	63
All	19	13	12	618.60
S. E. of S. E. of	21	"	"	40
N. W. of N. E. of	23	"	12	40
S. ½ of N. E. of	"	"	"	80
E. ½ of N. W. of	"	"	"	80
S. ½ of Sec	"	"	"	320
N. ½ of Sec	27	"	"	320
N. ½ of Sec	29	"	"	320
S. W. ¼ of Sec	"	"	"	160
N. E. of Sec	37	"	"	160
N. ½ of N. W. of	"	"	"	74.81
W. ½ of	33	"	"	320
E. ½ of S. E. ¼ of	35	"	"	80
S. W. of S. E. of	"	"	"	40
S. ½ of S. W. ¼ of	"	"	"	80
S. ½ of N. E. ¼ of	1	14	12	80
E. ½ of S. W. ¼ of	"	"	"	80
N. ½ of S. W. ¼ of	3	"	"	80
N. E. ¼ of	5	"	"	158.93
E. ½ of N. E. ¼ of	11	"	"	80
E. ½ of N. W. ¼ of	"	"	"	80
N. E. ¼ of N. W. ¼ of	13	"	"	40
E. ½ of	"	13	11	320
S. ½ of S. W. of	"	"	"	80
E. ½ of N. E. of	23	"	"	80
E. ½ of S. E. of	"	"	"	80
All of	25	"	"	640
				4,675.34

14 EXHIBIT "B."

Lands south of base line and east of sixth principal medidian in Kansas, certified to the State of Kansas for the benefit of the Atchison, Topeka and Santa Fe Railroad Company, March 30th, 1873.

Part of Section.	Section.	Town.	Range.	Acres.
S. ½ of N. E. of	9	14	13	80
N. W. of S. W. of	15	"	"	40
N. W. of N. E. of	19	"	14	40
N. W. of S. W. of	21	"	"	40
N. W. of S. W. of	25	"	"	40
N. W. of N. E. of	29	"	"	40
S. W. of N. W. of	"	"	15	40
N. W. of N. W. of	31	"	"	33.66
				353.66

EXHIBIT "C."

Statement of grounds of appeal from Commissioner of General Land Office to Secretary of Interior.

WASHINGTON, D. C., *April* 30, 1872.

HON. WILLIS DRUMMOND,
Commissioner of the Gen'l Land Office.

SIR: The Kansas Pacific Railroad Company, within the usual time, (60 days,) respectfully appeals from the decision ren-
15 dered by you on the 8th ultimo, in a letter to N. S. Goss, Esq., attorney of the Atchison, Topeka and Santa Fe Railroad Company, of which a copy was furnished me in your letter of the 12th of the same month, and assign for cause of appeal the following reasons:

Because, 1st, the Kansas Pacific Company, claiming under the grant by act of July 1st, 1862, and July 2, 1864, definitely fixed its route of road opposite the lands in contest before the route of a road was definitely fixed by the State of Kansas, (under which the Atchison, Topeka and Santa Fe Company claims,) under the act of 3d March, 1863.

2d. The Kansas Pacific Company fully completed its road opposite said lands, and the same was accepted by the President of the United States, prior to the location and construction of a railroad by the State of Kansas under said last-mentioned act of Congress.

3d. The State railroad competing for the lands so acquired by the Kansas Pacific Railroad Company does not extend, as the act of Congress requires, from Atchison *via* Topeka to the western line of the State, in the direction of Fort Union and Santa Fe, but extends from Emporia to Topeka. The State has acquired no lands in the middle portion of a line of route before it has built a
16 road from the initial point, as stipulated by Congress.

4th. The Kansas Pacific Company having surveyed and located its line opposite these lands prior to July 2d, 1864, the grant of that date vested the lands in contest in said company. At that time the State had not set a compass or stuck a spade upon its road from Topeka to Emporia.

5th. The route of the railroad, authenticated by the Governor's certificate of Dec. 27th, 1870, was not located before 1869 or 1870, and as *that is the only valid and authentic route binding upon the State and the United States*, all the preliminary surveying and mapping by the Atchison, Topeka and Santa Fe Company is of no validity, but is superceeded by the maps of the State road as built.

The line so authenticated by the Governor *is the only one on which the grant can be legally adjusted*, and the right of the State to specific lands did not vest until the final location of said line was mad[e] and approved by the State officers.

No route had been or could have been "definitely fixed" by the A., T. and S. F. Company. The State alone had power to "definitely fix" the route of a road, and the State did not do this until the year 1870.

6th. Your office erred in holding that the withdrawal of March 19th, 1863, on a line from Atchison by Topeka and Council
17 Grove inures to the benefit of the State for a road from Topeka to Emporia. The general route then indicated has been totally abandoned by the subsequent act of the State in locating another line.

Very respectfully, your ob'd't servant,

(S'g'd) HENRY BEARD,
Att'y for the K. P. R. R. Co.

Endorsed: No. 1708. Circuit court of the United States, district of Kansas. The Kansas Pacific Railway Company *vs.* The Atchison, Topeka and Santa Fe Railway Company. Bill in equity. J. P. Usher, solicitor for complainant. C. E. Bretherton, of counsel. Filed Oct. 11, 1876. A. S. Thomas, clerk.

Security for Costs.

In the Circuit Court of the United States for the District of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action,
18 or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, I hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this 11th day of October, 1876.

S. J. GILMORE.

Endorsed: No. 1708. The Kansas Pacific Railway Company *vs.* The Atchison, Topeka and Santa Fe R. R. Co. *et al.* Security for costs. Filed October 19th, 1876. A. S. Thomas, clerk.

Chancery Subpœna.

And on this day, to wit, October 11, 1876, the clerk of said court issued a writ of chancery subpœna in said entitled suit, which said chancery subpœna, with the endorsements and marshal's return thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

The United States of America to the Atchison, Topeka and Santa Fe Railway Company, Greeting:

We command you, and every of you, that you appear before our judge of our circuit court of the United States of America for the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of November next, to answer the bill of complaint of the Kansas Pacific Railway Company, this day filed
19 in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of Topeka, in said district, this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] A. S. THOMAS, *Clerk.*

MEMORANDUM.—The above-named defendant is notified that unless it enter its appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against it as confessed, and a decree entered accordingly.

A. S. THOMAS, *Clerk.*

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

20 Received the within writ October the 11th, 1876, and executed the same as follows, to wit:

Served on the within-named defendant, The Atchison, Topeka and Santa Fe Railway Company by delivering to C. F. Morse, its superintendant, and to Ross Burns, its solicitor, a full, true, and certified copies of this writ to each, at Shawnee county, State and district of Kansas, this 16th day of October, A. D. 1876.

I further return that I was unable to find, after diligent search

and enquiry, either the president, vice-president, or treasurer of said company in my district.

CHAS. H. MILLER,
U. S. Marshal.
By C. L. VANDERPOOL, *Deputy.*

Marshal's fees, $4.00.

Endorsed: Circuit court United States, district of Kansas. The Kansas Pacific Railway Company *vs.* The Atchison, Topeka and Santa Fe Railway Company. Chancery subpœna. Returnable to rule day, first Monday in November, A. D. 1876. A. S. Thomas, clerk. Filed Oct. 31, A. D. 1876. A. S. Thomas, clerk. J. P. Usher & C. E. Bretherton, comp't's sol's.

21 And on this day, to wit, November 6th, 1876, the clerk of said court made an entry on the order book of said court in said entitled suit, which entry is in the words and figures following, to wit:

Appearance of Def't.

THE KANSAS PACIFIC RAILWAY COMPANY *vs.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.	1708.	In Equity.

And now comes the defendant in above-entitled suit, by Ross Burns & J. G. Waters, its solicitors, and enters its appearance in said entitled suit & to the complainant's bill of complaint therein filed.

And on this day, to wit, Friday, December 1st, 1876, in the November term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Journal Entry.

THE KANSAS PACIFIC RAILWAY COMPANY *vs.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.	1708.	In Equity.

Now comes the said defendant, by its solicitors, and, on its motion, leave is given it to file an answer herein at February rules next.

21½ And on this day, to wit, February 3, 1877, the defendant herein, by its solicitor, filed in the clerk's office of said court its answer in said entitled suit, which said answer is in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States within and for the District of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY, Complainant,
versus
THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Defendant. } No. 1708.

The answer of the Atchison, Topeka and Santa Fe Railroad Company, defendant, to the bill of complaint of the complainant.

This defendant now, and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, or imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, saith:

I. This defendant admits that the complainant and this defendant are corporations incorporated by the laws of the State of
22 Kansas, and are citizens of the said State of Kansas; that the matters in controversy in this suit arise exclusively under the laws of the United States, and exceed in value the sum of five hundred dollars, and that the matter in dispute is as to the ownership of the lands mentioned and described in the complainant's bill of complaint.

II. This defendant admits that the complainant was incorporated in the manner and at the time alleged in its said bill of complaint, and that its name has been changed, as is also therein alleged.

III. This defendant admits that it was incorporated in the manner and at the time alleged in said bill of complaint, and that its name has been changed, as is also therein alleged.

IV. This defendant admits that the complainant makes claim to the lands in controversy under and by virtue of the act of Congress of July 1st, 1862, and the amendments thereof of July 2nd, 1864, as alleged in said bill of complaint, but it denies that the complainant has any right, title, or interest therein.

V. This defendant admits that it claims the lands in controversy under and by virtue of the act of Congress of March 3rd, 1863, as alleged in said bill of complaint, and also and as well by and
23 through certain acts and things done, had, and performed thereunder, and hereinafter alleged.

VI. This defendant admits that the said lands in controversy were certified to the said State of Kansas in the manner and at the times alleged in said bill of complaint.

VII. This defendant admits that the State of Kansas executed to it patents for said lands, in the manner and at the times alleged in said bill of complaint.

VIII. This defendant denies that the Secretary of the Interior acted under a misapprehension of the law applicable to the facts before him, in certifying said lands to the State of Kansas.

IX. This defendant admits that the facts submitted to the Secre-

tary of the Interior, in the controversy had before said Secretary between the complainant and this defendant, are as alleged in said bill of complaint, together with the further fact as to whether the said lands were situate within twenty miles of the line of the defendant's road as definitely located and constructed.

X. This defendant denies that the Secretary of the Interior acted under a misapprehension of the law applicable to the facts before him, or that the facts submitted to him showed, as a matter of law, that the lands in controversy were reserved by the United
24 States for the benefit of complainant before the line of defendant's railroad was definitely fixed; or that such facts showed as matter of law that complainant had, by full compliance with the provisions and conditions of said act of July 2d, 1864, become absolutely entitled to said lands before the State of Kansas had complied with the provisions and conditions of the act of March 3d, 1863; or that such facts showed as matter of law that the lands in controversy should have been patented to the complainant and not certified to the State of Kansas.

XI. This defendant admits that the lands in controversy are situate in the counties of Wabaunsee and Osage, in the State of Kansas, and to the west of defendant's line of railroad, but denies that the same, or any part thereof, lies, or is situate, between the 15 and 20 miles limits of the complainant's line of railroad as the same is actually located and constructed, or that any part or parcel of said lands lie beyond or outside the 20 mile limit of the defendant's line of railroad as the same is actually located and constructed.

XII. This defendant neither admits or denies, as it is unadvised of the truth thereof, as to the acceptance by the complainant
25 of the act of Congress of July 1st, 1862, or that it filed a map or maps of the location of its road, or that the lands within 15 miles of the located line of its said railroad were withdrawn for the benefit of complainant, as alleged in said bill of complaint, and asks that the same may be strictly proven; but this defendant admits that if any withdrawal of lands within 15 miles of complainant's line of railroad was ever made, that such withdrawal did not cover or embrace any of the lands in controversy in this suit.

XIII. This defendant neither admits or denies, as it is unadvised of the truth thereof, as to the time the complainant commenced the construction of its road or when it completed the same, and asks that the same may be strictly proven.

XIV. This defendant neither admits or denies, as it is unadvised of the truth thereof, as to when the complainant filed any other map of the location of its road, or whether such other map showed the date of the actual location of the various parts thereof, or whether the same was approved by the Commissioner of the General Land Office, and asks that the same may be strictly proven; but this defendant admits that the Commissioner of the General Land Office did, on the 16th day of February, 1866, restore
26 to the public lands the lands lying between the 20th and

25th miles of complainant's railroad, and that the lands lying within 20 miles of the complainant's road were, by the said Commissioner, absolutely withdrawn from sale and reserved for the use of said complainant, but this defendant denies that any of the lands in controversy were part or parcel of the lands so restored or withdrawn, or were in any manner affected by the action of the said Commissioner in restoring or withdrawing the said lands.

XV. This defendant neither admits or denies, as it is unadvised of the truth thereof, as to the time the third section of complainant's railroad was completed or accepted by the President of the United States, or when the fourth section of complainant's line of railroad was completed or accepted, and asks that the same may be strictly proven.

XVI. This defendant neither admits or denies, as it is unadvised of the truth thereof, that the complainant tendered the register and receiver of the proper local land office their fees and the costs of survey, or requested the issuance of a patent to it for the lands in controversy, or that the issuance of said patent was refused, as alleged in said bill of complaint, and asks that the same may be strictly proven; but this defendant denies that, by reason of the completion of its said road and the acceptance thereof, the
27 complainant was entitled to receive a patent for said lands or any part thereof.

XVII. This defendant admits that an appeal was taken by the complainant from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, as to the lands in controversy, and for the causes and upon the grounds alleged in said bill of complaint, and that the said Secretary of the Interior, after hearing the evidence adduced by the complainant and this defendant, rendered his decision in favor of this defendant, and ordered the said lands to be certified to the State of Kansas for the use of said defendant.

XVIII. This defendant admits that a withdrawal of lands was made by the Secretary of the Interior, in pursuance of the act of Congress of March 3rd, and that such withdrawal was to aid in the construction of a railroad from Atchison *via* Topeka to the west line of Kansas, in the direction of Fort Union and Santa Fe, as by said act provided, but this defendant charges the fact to be that the said withdrawal was made by the Secretary of the Interior on the 19th day of March, 1863, and was to take effect from the receipt of the same at the proper local land offices; that the same was received at the Topeka land office, being the district wherein
28 the lands in controversy were then situate, on the 30th day of April, 1863, and the same took effect on that day, and has ever since continued to be in full force and effect; that the said withdrawal included and embraced all the lands in controversy, and from the date aforesaid the said lands in controversy were wholly withdrawn from ordinary private sale or location, and also from pre-emption and homestead thereby; that the said withdrawal was made by the said Secretary of the Interior at the request of the Senators and Representatives in Congress from the State of Kansas,

and not at the instance and request of this defendant; that the said withdrawal was made of a strip of land ten sections in width on each side of the defendant's proposed line of railroad, as the same was then projected, and to secure to the State of Kansas for the use of said defendant, and that the same might not be taken for other purposes, the said lands under and by virtue of the said act of Congress of March 3d, 1863, as the said Secretary lawfully might do. Defendant denies that the lands in controversy in this cause, & described in the exhibits to complainant's bill, are or were embraced in the grants mentioned in the acts of Congress referred to in the fourth paragraph of complainant's bill, and
29 denies that the President of the United States ordered or directed said lands in controversy to be patented to complainant, as alleged in amendment to complainant's bill, and as to the allegation of compliance with the provisions of the said act of Congress, as set forth in complainant's bill, this defendant neither admits or denies the same, being wholly uninformed thereto, but asks that the same be strictly proven if true.

XIX. This defendant admits the Legislature of the State of Kansas, by an act passed on the 9th day of February, 1864, accepted the provisions of said act of Congress of March 3d, 1863, and assigned the lands granted in aid of the construction of a railroad from Atchison *via* Topeka to the west line of the State of Kansas to the defendant, and this defendant charges the fact to be that this defendant, on the 16th of February, 1864, filed with the secretary of the State of Kansas, and within the time authorized by said act, its acceptance of the said act of the Legislature of the State of Kansas.

XX. This defendant, further answering, says that the line of defendant's railroad from Topeka to Emporia, and opposite to the lands in controversy, was, on the 1st day of January, 1866,
30 definitely fixed and located, and that all proper surveys and maps required by the said act of Congress of March 3rd, 1863, and by the said act of the Legislature of the State of Kansas, were made and filed in the proper departments by the defendant prior thereto; that upon the definite fixing and location of the said defendant's line of railroad, the said lands in controversy were within 20 miles from the same; and that the fact that the said lands were so situate within 20 miles thereof, was submitted to the said Secretary of the Interior for decision, in the controversy between the complainant and defendant, and was by him decided in favor of this defendant.

XXI. This defendant, further answering, says that from the 16th day of February, 1864, when it accepted the said act of the Legislature of the State of Kansas, it commenced and carried on in good faith, and to the best of its means and ability, the location and construction of its said road from Atchison to the west line of the State of Kansas, and continued so to do until its said line of railroad was fully completed; that the said line of railroad was fully completed and equipped between Topeka and Emporia, and opposite the lands in controversy, on the 27th day of December, 1870, and was on that

day accepted by the governor of the State of Kansas, and that
31 the whole line of said road was fully completed and equipped on the 25th day of December, within the time limited by the said act of Congress, and the same was also accepted by said Governor; and that in all other the said defendant fully complied with the provisions of said act of Congress.

XXII. This defendant, further answering, says that upon the line of its said railroad being definitely fixed and located, it appeared that the United States had sold a large portion of the lands lying within ten miles thereof, and that the right of pre-emption and homestead settlement had attached to a large portion of the same, and that a large portion of the same had been reserved by the United States for other purposes, and the amount of said lands inuring to the State of Kansas for the use of this defendant had been greatly diminished thereby; that thereupon and by virtue of the act of Congress of March 3rd, 1863, as aforesaid, the said Secretary of the Interior selected, for the purposes of said grant, and to make up said deficiency, so much land in alternate sections and parts of sections, designated by odd numbers, as equaled the said lands sold, reserved, or appropriated by the United States, and to
32 which the rights of, and homestead settlements had attached, as aforesaid; that the lands so selected were situate nearest to the tiers of sections within the ten miles limit of the defendant's line of railroad so definitely fixed as aforesaid, and included and embraced all the lands in controversy.

XXIII. This defendant, further answering, says it denies each and every allegation in the said bill of complaint contained not herein admitted or otherwise answered.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged, without this that there is any other matter, cause, or thing in the complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge and belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

[SEAL.] THE ATCHISON, TOPEKA AND SANTA FE
33 RAILROAD COMPANY, DEFENDANT.
By F. PENLUTZ, *V. Pres., its acting President.*

Attest:
E. WILDER, *Its Secretary.*
ROSS BURNS, *Solicitor for Defendant.*

Endorsed; In the circuit court of the United States for the district of Kansas. No. 1708. The Kansas Pacific Railway Company *versus* The Atchison, Topeka and Santa Fe Railroad Company. Answer of defendant, & amendments by interlineations. Filed Febr'y 3d,

1877. A. S. Thomas, clerk. Refiled Aug. 12, 1879. A. S. Thomas, clerk.

And on this day, to wit, February 27th, 1877, the complainant herein, by its solicitors, filed in the clerk's office of said court its replication in said entitled suit, which said replication is in the words and figures following, to wit:

Replication.

Circuit Court of the United States, District of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY, Complainant, *vs.* THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Defendant.	In Equity. Replication.

34 The above complainant, for replication to the answer of above defendant, says:

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of said answer, will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatever in the said answer contained, material or effectual in the law to be replied by this repliant, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

J. P. USHER.
C. E. BRETHERTON,
Complainant's Solicitors.

Endorsed: No. 1708. Circuit court of the United States, district of Kansas. The Kansas Pacific Railway Company *vs.* The Atchison Topeka and Santa Fe Railroad Company. Replication. J. P. Usher, C. E. Bretherton, complainant's sol'rs. I consent to
35 filing of this replication. Ross Burns & J. G. Waters, sol'rs for defendant. Filed Febr'y 27th, 1887. A. S. Thomas, clerk.

And on this day, to wit, May 29th, 1877, the parties hereto filed in the clerk's office of said court, in said entitled suit, a stipulation, which said stipulation is in the words and figures following, to wit:

Stipulation.

Circuit Court of U. S., District of Kansas.

KANSAS PACIFIC R. W. Co., Complainant,
vs.
ATCHISON, TOPEKA & SANTA FE R. W. Co., Defendant.
} Stipulation.

It is hereby stipulated that above case shall be continued over the term of the next court.

Dated May 24, 1877.

C. E. BRETHERTON,
Att'y for Complainant.
ROSS BURNS,
Att'y for Defendant.

Endorsed: No. 1708. Circuit court, Kansas. Kan. Pac. Railway Co. *vs.* Atchison, Topeka & Santa Fe R. W. Co. Stipulation. Filed May 29, 1877. A. S. Thomas, clerk.

And on this day, to wit, Tuesday, June 5th, 1877, in the June term of said court, in the record of the proceedings thereof in
36 said entitled suit is the following entry, to wit:

Journal Entry.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.
} 1708.

Continued to the next term hereof.

And on this day, to wit, Saturday, Dec. 1st, 1877, in the November term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Journal Entry.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.
} 1708.

It is ordered by the court that this suit be, and the same is hereby, continued to the next term of this court.

And on this day, to wit, May 28th, 1878, the parties hereto, by their attorneys, filed in the clerk's office, in said entitled suit,
37 a stipulation for a continuance, which said stipulation is in the words and figures following, to wit:

Stipulation to Continue.

U. S. Circuit Court, District of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.
} In Equity. No. 1708.

It is hereby stipulated and agreed that this case shall stand continued to the November term of this court.

May 28, 1878. J. P. USHER, *Solicitor for Complainant.*
ROSS, BURNS & J. G. WATERS,
Sol'rs for Defendant.

Endorsed: No. 1708. U. S. circuit court. The K. P. Railway Co. *vs.* The A., T. & Santa Fe R. R. Co. Stipulation for a continuance. Filed May 28th, 1878. A. S. Thomas, clerk.

And on this day, to wit, Tuesday, June 4th, 1878, in the June term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

38 *Continued.*

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.
} 1708.

It is ordered by the court that this suit be, and the same is hereby, continued, as per stipulation.

And on this day, to wit, November 26th, 1878, in the November term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Continued.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.
} 1708.

It is ordered by the court that this suit be, and the same is hereby, continued to the next term of this court.

And on this day, to wit, Thursday, June 5th, 1879, in the June term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Leave to Amend.

39 THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.
} 1708.

Now come the parties herein, by their solicitors, and, on motion

of complainant, it is ordered by the court that it have leave to file amendment to bill, and leave given defendant to amend answer, if desirable.

And on this day, to wit, Friday, June 6th, 1879, in the June term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Continued.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY. } 1708.

By consent, it is ordered by the court that this suit be, and it is hereby, continued to the next term of this court.

Answer, as Amended, Refiled.

And on this day, to wit, August 12, 1879, the defendant herein, by its solicitor, refiled its answer, amended by interlineation,
40 which said amended ans-er is recorded on page 21½ of this transcript.

And on this day, to wit, Monday, November 24th, 1879, in the November term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

THE KANSAS PACIFIC RAILROAD COMPANY
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY. } 1708.

It is ordered by the court that this action be, and it is hereby, continued to the next term of this court.

And on this day, to wit, January 7th, 1881, there was filed in the clerk's office of said court, in said entitled suit, the opinion of the circuit judge, which said opinion is in the words and figures following, to wit:

Opinion.

Circuit Court of the United States, District of Kansas. January, 1881.

THE KANSAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
41 THE ATCHISON, TOPEKA & SANTA FE RAILROAD Co., Respondent. } Equity.

The land in controversy in this suit is situated in the counties of Wabaunsee and Osage, in the State of Kansas. They are claimed by complainant as the successor of the Leavenworth, Pawnee & Western Railroad Company under the act of Congress, entitled "An act to aid in the construction of a railroad and telegraph line from

the Missouri river to the Pacific Ocean," &c., approved July 1st, 1862, (12 Stat., 489,) and the act amendatory thereof, approved July 2d, 1864, (13 Stat., 356.)

They are claimed by the respondent under and by virtue of the act of Congress, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," approved Mar. 3d, 1863, (12 Stat., 772.)

The first-named act granted to the Leavenworth, Pawnee & Western Railroad Company, (now the Kansas Pacific Railway Company,) "every alternate section of public land designated by odd numbers, to the amount of *five* alternate sections per mile on each side of" the railroad authorized by the act to be constructed by said company "on the line thereof and within the limits of *ten* miles on each
42 side of said road *not sold, reserved, or otherwise disposed of by the United States*, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

By Sec. 4 of the amendatory act of 1864, the above provision was amended by striking out "five" where the same occurs and inserting in lieu thereof the word "ten," and by striking out the word "ten" where it occurs and inserting in lieu thereof the word "twenty;" thus doubling the land grant. The original act (Sec. 7) authorized the Secretary of the Interior, upon the filing a map designating the general route of the road, to "cause the lands within *fifteen* miles of said designated route or routes, to be withdrawn from pre-emption private entry and sale," and by the amendatory act word "fifteen" in said clause was made to read "twenty." The lands in controversy were public lands July 1st, 1862, and are within twenty miles of complainant's road as located and constructed, and have not since been entered under any pre-emption or homestead law or otherwise reserved or disposed of by the United States, unless they are embraced in the grant to the State of Kansas, by virtue of said act of March 3rd, 1863, and proceedings thereunder, as herein shown, and inure to that grant instead of to the grants to the complainant.

43 The State of Kansas, by an act approved February 9th, 1864, accepted the grant made by the aforesaid act of Congress of March 3rd, 1863, and conferred the same upon the respondent. (Compiled Laws of Kansas, 1879, p. 778.) The grant to the State, and by the State to respondent, was of "every alternate section of land designated by odd numbers, for ten sections in width on each side of said road."

The lands in controversy are within the limits of the enlarged grant to complainant, made by the act of July 2nd, 1864, but not within the limits of the original grant of 1862; that is to say, they are outside of fifteen miles limit, and are within the twenty miles limit. They are also within the ten miles limit in the grant to the State; being, in fact, at a point where the two grants cross each other. On the 19th day of March, A. D. 1863, the Commissioner of the General Land Office, under instruction of the Secretary of the

Interior, and with his approval, made a withdrawal of lands in said State of Kansas, under said act of Congress, approved March 3rd, 1863, withdrawing all of said lands with other lands from market or entry at public or private sale or location or entry under the homestead or pre-emption laws of the United States, or for other purposes, which said withdrawal was to take effect from and
44 after its receipt, at the local land office in said State, and which was received at the local land office at Topeka, Kansas, in which land district all of said lands in controversy were then situated, on the 30th day of April, 1863, and immediately took effect on said day, and has since said day continued in full force and effect. All of the lands in controversy were included in, and covered by, the said withdrawal made on account of the said act of Congress approved March 3rd, 1863. Both the said complainant and defendant have done everything necessary to be done under the law to entitled them to the lands in controversy, provided no prior legal right or reservation had intervened for the benefit of the other.

J. P. Usher, for complainant; Ross Burns, A. A. Hurd, Geo. R. Peck, for respondent.

McCrary, circuit judge:

The lands in controversy were not granted to the complainant by the original Pacific Railroad act of 1862. They are outside of the limits of that grant. If complainant's title can be sustained at all, it must be under and by virtue of the amendatory act of July 2d, 1864, enlarging the Pacific Railroad grant.

Under this latter act the complainant undoubtedly acquired the title, unless by the intervening grant to the State of Kansas,
45 of March 3d, 1863, and the withdrawal of the lands thereunder, they were, within the meaning of the statute, "reserved or otherwise disposed of by the United States." These several acts occurred, in chronological order, as follows:

July 1, 1862. Original grant.

March 3d, 1863. Grant to the State.

April 30, 1863. Lands withdrawn from market by order of the Commissioner of the General Land Office, with the approval of the Secretary of the Interior.

July 2d, 1864. Amendatory act passed, enlarging the original grant.

The case turns upon the effect that is to be given to the act of the Interior Department withdrawing the lands from sale, pre-emption, or homestead entry.

Did this amount to a restoration of the lands, within the meaning of the grant? If so, the lands in controversy did not pass by the grant of 1864, and the complainant has no title.

In the case of Wolcott *vs.* Des Moines Co., (5 *Wall.*, 681,) the opinion was expressed that the Interior Department was the competent power to make an order withdrawing or reserving public lands from sale, and it was held that if this were not so, a grant of land for a specific purpose "carried along with it, by necessary implication, not

only the power, but the duty of the land office to reserve from sale the lands embraced in the grant."

46 The proposition that wherever there is authority to withdraw any of the public lands from market, the Land Department of the Government is the proper authority to make the order of withdrawal, is, to my mind, too clear to require argument to enforce it. Nor can there be any doubt that the moment the grant of March 3rd, 1863, was made, the *the* authority to withdraw the lands embraced therein was created. It is also well settled that a withdrawal of public lands from sale by competent authority, for the purpose of appropriating them to any lawful purpose, operates to sever such lands from the public domain. *Wilcox* vs. *Jackson*, 13 *Pet.*, 498. *Leavenworth, &c., R. R. Co.*, vs. *United States*, 92 *U. S.*, 745. *Railroad Co.* vs. *Fremont Co.*, 9 *Wall.*, 94.

Complainant, however, relies on the ruling of the Supreme Court in the case of Missouri, &c., Railroad Co. *vs.* The Kansas Pacific Railway Co., 97 U. S., 491. In that case the acts under which the complainant claims were construed, Mr. Justice Field, in delivering the opinion of the Court, construing the two acts together, said:

"When the location was made, and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned, the act

47 having the same operation upon the sections as if they had been specifically described in it. It is true that the act of 1864 enlarged the grant of 1862, but this was done, not by words of a new and an additional grant, but by a change in the words of the original act, substituting for those there used words of larger import. This mode was evidently adopted that the grant might be treated as if thus made originally; and therefore, as against the United States, the title of the plaintiff to the enlarged quantity, with the exceptions stated, must be considered as taking effect equally with the title of the less quantity, as of the date of the first act."

I do not understand the Supreme Court to hold that the amendatory grant of 1864 passed to the grantee the title to lands which Congress had in the meantime granted to another, or which had in the meantime been by competent authority otherwise disposed of. It is certainly clear that, during the time intervening between July 1st, 1862, when the original grant was made, and July 2, 1864, when it was amended and enlarged, the United States was at liberty to dispose of any public lands outside of the limits of the original grant, and the lands in controversy were, during that period, public lands outside of said grant. They were, I presume, up to

48 the time of their withdrawal, under the grant to the State, lands in the market, subject to pre-emption or homestead entry. If any of them had been, prior to the passage of the act of 1864, disposed of under the pre-emption or homestead laws, or patented to private parties under any law of the United States, it would, I apprehend, hardly be claimed that lands thus disposed of would have passed to the complainant. And yet this would be the logical

consequence of holding that the two acts are to be construed as one act *for all purposes.*

The Supreme Court was careful to avoid this construction. It is said that "when the location was made, *and the sections granted ascertained*, the title of the plaintiff took effect by relation as of the date of the act, *except as to the reservations mentioned.*" There is in this language a distinct recognition of the fact that the reservations mentioned did not pass, and that an inquiry was necessary to ascertain what sections did and what did not pass. But to make the meaning still more definite and certain, the Supreme Court add: "And therefore, *as against the United States*, the title of the plaintiff to the enlarged quantity, *with the exceptions stated*, must be considered as taking effect equally with the title to the lesser quantitity, as of the date of the first act." This language not only does not
49 authorize, it forbids the inference that, as against an intervening grantee of some of the lands included within the limits of the larger grant, the title would pass under the two grants as of the date of the former. It is only as against the United States that this construction prevails. As against other grantees claiming adversely to the United States as well as to complainant, the later act must be considered as a subsequent grant, and as taking effect only from its date.

Decree for respondent.

Endorsed: No. 1708. The Kansas Pacific Railway Co. *vs.* The Atchison, Topeka and Santa Fe Railroad Company. Opinion. Filed Jan. 7th, 1881. A. S. Thomas, clerk. McCrary, circuit judge.

And on this day, to wit, June 16th, 1881, the parties hereto, by their solicitors, filed in the clerk's office of said court, in said entitled suit, an agreed statement of facts, which said agreed statement of facts is in the words and figures following, to wit:

The following is the agreed statement of facts in the cause entitled, and in the decree mentioned.

June 16, 1881. C. G. FOSTER, *Judge.*

Agreed Statement of Facts.

Circuit Court of the United States.

50 DISTRICT OF KANSAS:

THE KANSAS PACIFIC RAILWAY COMPANY, Complainant,
against
THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO., Defendant.

It is agreed by the parties that this suit shall be tried in this and all other courts upon the following agreed statement of facts, which, it is hereby agreed, are all the facts in the case, without regard to admissions, allegations, and denials in the pleadings.

The complainant presents the following facts to be considered:

1. The complainant is a corporation, incorporated by an act of the Legislature of the Territory of Kansas, and entitled "An act to

incorporate the Leavenworth, Pawnee and Western Railroad Company, and the name of which has been duly changed, first to the Union Pacific Railway Company, Eastern Division, and then to the Kansas Pacific Railway Company, and in that name is the now complainant.

2. Both parties are citizens of the State of Kansas, but the matters in controversy in this action arise exclusively under the laws of the United States, and the matters in dispute exceed in value the
51 sum of $10,000, being the ownership of the lands described in schedules "A" and "B," attached to complainant's bill.

3. The complainant is the same corporation mentioned in the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862, and in the act amendatory thereto, approved July 2, 1864, in the first act as the Leavenworth, Pawnee & Western Railroad Company, and in the second as the Union Pacific Railway Company, Eastern Division; and the complainant claims to be entitled to said land under and by virtue of the grants contained in the first-named act, and in the amendments thereto.

4. Defendant claims to be entitled to said lands under and by virtue of an act of Congress, entitled "An act for a grant of lands for the State of Kansas, in alternate sections, to aid in the construction of certain railroad and telegraph lines in said State," approved March 3, 1863.

5. The lands in controversy are situated in the counties of Wabaunsee and Osage, between the fifteen and twenty mile limits, south of complainant's railroad as actually located and constructed,
52 and between the 72d and 96th mile-posts thereof west of the Missouri River.

6. Said lands are west of defendant's railroad, between the ten and twenty mile limits thereof, as actually constructed.

7. Complainant, in due time, filed in the Department of the Interior its acceptance of the said acts of July 1st, 1862, and the amendatory acts of July 2, 1864.

8. Complainant commenced the construction of its said railroad mentioned in said acts of Congress within the time required by said acts, and it was all completed within the time required by said acts, and complainant duly complied with the terms and conditions thereof, so as to entitle it to the lands granted by said acts in aid of the construction of said road.

9. On the 10th day of January, 1866, the complainant filed with the Secretary of the Interior a map of the definite location of its said railroad, showing, by flagstaffs marked thereon and the certificates and affidavits annexed thereto, the dates of the actual location of the various parts thereof, according to, and in compliance with, the instructions of said Secretary, and said railroad was definitely located along and contiguous to the lands in controversy before February 4, 1865, and upon said location said railroad was afterwards duly constructed.

53 10. On February 6th, 1866, said location was approved by the Commissioner of the General Land Office, and by instructions, dated February 16th, 1866, the odd-numbered sections of land within twenty miles of complainant's railroad were withdrawn from sale and reserved for the use of complainant.

11. The complainant's railroad along and adjacent to the lands in controversy was duly completed, and accepted by the President, on or before December 14th, 1866, and the President, by executive order, directed the Secretary of the Interior to cause patents to be issued to the complainant for the lands enuring to said grant.

12. On the 30th day of November, 1870, the complainant tendered the fees payable to the register and receiver at the land office at Topeka, and on November 29, 1870, duly deposited and tendered the costs of survey to the surveyor general of Kansas, and requested that a patent might issue to it for the lands in controversy; but said register and receiver, under instructions from the Commissioner of the General Land Office, refused to receive said costs and fees, on the ground that the State of Kansas, for the use of defendant, and not the complainant, was entitled to said lands.

13. Complainant appealed from such instructions of said
54 Commissioner to the Secretary of the Interior, and the grounds of such appeal are shown in the letter or statement of appeal made Exhibit "C" to complainant's bill; and the said Secretary, after hearing the evidence and arguments adduced by the parties, rendered his decision in favor of the defendant, and ordered said lands to be certified to the State of Kansas for defendant's use.

14. The lands in controversy were public lands July 1st, 1862, and are within twenty miles of complainant's road as located and constructed, and have not since been entered under any pre-emption or homestead law, or otherwise reserved or disposed of by the United States, unless they are embraced in the grant to the State of Kansas, by virtue of said act of March 3rd, 1863, and proceedings thereunder, as herein shown, and enure to that grant instead of the grants to the complainant.

The defendant, conceding the foregoing statements to be correct, presents the following additional facts, to be considered in connection with the foregoing:

1. The defendant is a corporation, duly incorporated by an act of the Territorial Legislature of Kansas, entitled "An act incorporating the Atchison & Topeka Railroad Company," approved February 11, 1859, and which has since legally changed its name
55 to the "Atchison, Topeka & Santa Fe Railroad Company."

2. That the defendant claims the lands in controversy under and by virtue of an act of Congress, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraph lines in said State, approved March 3, 1863, and an act of the Legislature of the State of Kansas, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such roads and tele-

graphs," approved February 9th, 1864; which said act is hereby referred to and made a part hereof, as the same appears in the statutes of said State.

3. That the defendant, on the 16th day of February, A. D. 1864, filed with the secretary of the State of Kansas, and within the time authorized by said act, its acceptance of the said act of the Legislature of the State of Kansas.

4. That on the 19th day of March, A. D. 1863, the Commissioner of the General Land Office, under instruction of the Secretary of the Interior, and with his approval, did make a withdrawal of lands in said State of Kansas, under said act of Congress,
56 approved March 3, 1863, withdrawing all of said lands with other lands from market or entry, at public or private sale, or location or entry under the homestead or pre-emption laws of the United States, or for other purposes, which said withdrawal was to take effect from and after its receipt at the local land office in said State, and which was received at the local land office at Topeka, Kansas, in which land district all of said lands in controversy were then situated, on the 30th day of April, 1863, and immediately took effect on said day, and has since said day continued in full force and effect.

5. That said withdrawal was for the benefit of the line of railroad afterwards constructed, and now owned and operated by the defendant under authority of said act of the State of Kansas, approved February 9, 1864. That on the 1st day of January, A. D. 1866, the said defendant caused a map or profile of its road or definite location from Topeka to Emporia, and adjacent to and within twenty miles of all of said lands in controversy, to be filed as required by law, duly authenticated and certified to.

6. That said defendant has caused its line of railroad to be fully constructed, equipped, and operated in full compliance with
57 the provisions of said act of Congress and said act of the State of Kansas, and the same has been duly accepted and approved by the proper authorities.

7. That on the 25th day of February, A. D. 1873, all the lands described in Schedule "A" of complainant's bill were duly certified to the State of Kansas by the Secretary of the Interior, and on the 31st day of March, A. D. 1873, the lands designated in Schedule "B" of complainant's bill were certified to the said State as aforesaid.

8. That said lands were so certified to the State of Kansas for the benefit of the said defendant over the objection of the complainant, and after the same had been fully contested before the Commissioner of the General Land Office, and after the decision of said Commissioner had been appealed from by complainant, and duly affirmed by the Secretary of the Interior.

9. That the proper officers of the State of Kansas, on the 29th day of March, A. D. 1873, executed to defendant a patent, which, among other lands, included all said lands in controversy, designated in Schedule "H" of complainant's bill, and on the 19th day of May,

A. D. 1873, duly patented to said defendant all the lands in controversy, designated in said Schedule "B."

58 10. That all of said lands in controversy are situated between the fifteen and twenty-five mile limits of withdrawal of lands for complainant's line of railroad, but within twenty miles of said road as constructed, and between the ten and twenty mile limit of grant of lands to the State of Kansas for defendant's line of railroad, and within twenty miles of said defendant's said line of railroad as definitely located as aforesaid, and within twenty miles of said defendant's line of railroad as actually constru-ed and now operated.

11. That all of the lands in controversy were included in and covered by the said withdrawal made on account of the said act of Congress, approved March 3d, 1863, made as aforesaid on the 19th day of March, A. D. 1863.

12. That defendant's line of railroad was fully completed and equipped between Topeka and Emporia, and opposite to and within twenty miles of all of said lands in controversy, December 27th, 1870, and was on that day accepted by the Governor of the State of Kansas, and that said road was fully completed, equipped, and in operation December 27th, A. D. 1862, within the time limited by the said act of Congress, and the same was on said day fully ac-

59 cepted by the said Governor from the city of Atchison by the way of the city of Topeka to the west line of the State, in the direction of Santa Fe.

13. That when said defendant constructed its said line of railroad from Topeka to Emporia, as aforesaid, it did not construct the whole of said line opposite the lands in controversy, as designated on said map of location, filed January 1, 1866, but made slight variations from said line, diverging therefrom as far in some cases as one mile, and filed a map of definite location, showing such variations, October 6, 1868, duly authenticated, with the proper officers, and also filed another map of the definite location of said line of railroad between said points, showing additional slight variations, on the — day of ——, A. D. 1870, duly authenticated; but each of said designated routes were within twenty miles of all of said lands in controversy; and said line of railroad was constructed, and is now operated, within twenty miles of all of said lands in controversy, and upon the line of location, as shown by the map filed in 1870, which said map of 1870 was not filed until after said railroad was constructed from Topeka to Emporia.

14. When the line of the defendant's railroad was definitely fixed and located, it appeared that the United States had sold a large

60 portion of the lands lying within ten miles thereof, and that the right of pre-emption and homestead settlement had attached to a large portion of the same, and that a large portion of the same had been reserved by the United States for other purposes, and the amount of said lands inuring to the State of Kansas for the use of said defendant had been greatly diminished thereby; whereupon, and immediately upon the completion of said railroad as aforesaid, on the — day of ——, A. D. ——, by virtue of the act of Congress

of March 3, A. D. 1863, as aforesaid, the said Secretary of the Interior selected, for the purposes of said grant, and to make up said deficiency, so much lands in alternate sections and parts of sections designated by odd numbers as equaled the said lands sold, reserved, or appropriated by the United States, and to which the rights of homestead settlement had attached as aforesaid. That the lands so selected were selected nearest the tiers of sections within the ten mile limits of defendant's railroad, so definitely fixed and constructed as aforesaid, and included and embraced all the lands in controversy.

15. That both the said complainant and defendant have done everything necessary to be done under the law to entitle them to the lands in controversy, provided no prior legal right or reservation had intervened for the benefit of the other.

61 16. That the annexed certified copies hereto attached and made a part hereof, and marked Exhibit "A," are true and correct copies of the letters and orders which they purport to be copies of, and that the letter of instructions of March 19th, 1863, addressed to the register and receiver at Humbolt, Kansas, is also a true and correct copy of a similar order addressed on said day to the register and receiver of the land office at Topeka, Kansas, which was received at the said Topeka office April 30, 1863, and said copy shall be considered as though it was a true exemplification of the said order addressed and transmitted to said office at Topeka, Kansas, as aforesaid, and that said letter of instructions is the withdrawal referred to in the fourth paragraph of facts presented by defendant.

The complainant hereby agrees that the above allegations presented by defendant are true.

In testimony whereof, the said parties hereto have executed this instrument, by their attorneys, this 11th day of June, A. D. 1880.

J. P. USHER,
Solicitor for Complainant.
ROSS BURNS,
A. A. HURD,
GEO. R. PECK,
Solicitors for Defendant.

62 EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June* 2, 1879.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the following copies, namely:

Letter of March 4, 1863, from Kansas delegation in Congress to Hon. J. P. Usher, Secretary of the Interior, asking withdrawal of lands for railroad purposes.

Letter of this office, dated March 19th, 1863, to land officers in Kansas, ordering withdrawal of lands from market.

Approval by the department April 20th, 1863, of the above order of withdrawal.

Decision of Commissioner of the General Land Office, March 8th,

1872, in case of Kansas Pacific Company *vs.* Atchison, Topeka & Santa Fe Company.

Appeal by attorney of Kansas Pacific Company, April 30, 1872, from above decision.

Department decision, February 12, 1872, sustaining decision of this office of March 8, 1872.

Are true and literal exemplifications of the originals on file from the records of this office.

In testimony whereof, I have hereunto subscribed my name and cause the seal of this office to be affixed, at the city of Washington, on the day and year above written.

63 [L. S.] J. A. WILLIAMSON,
Commissioner of the General Land Office.

WASHINGTON, *March* 4, 1863.

Hon. J. P. USHER, *Secretary of the Interior.*

Your attention is called to the provisions of Senate bill No. 435, granting lands to the State of Kansas for certain lines of railroads therein mentioned.

The best interest of our State demand that these lands should be withdrawn from the market, and we would most respectfully request that you issue an order to this effect.

J. H. LANE.
S. C. POMEROY.
A. C. WILDER, *M. C.*

GENERAL LAND OFFICE, *March* 19, 1863.

Register and Receiver, Humbol-t, Kansas.

GENTLEMEN: The act of Congress approved March 3d, 1863, makes a grant of alternate sections of land to Kansas to aid in the construction, "First, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and *via* the Ohio crossing of the Osage river, to the southern line of the State," "with a branch from Lawrence, by the valley of the Wakarusa
64 river, to the point on the Atchison, Topeka & Santa Fe Railroad, where the said road intersects the Neosho river;" "second, from Atchison *via* Topeka to the western line of the State in the direction of Fort Union," &c., "with a branch from where this last-named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley."

This law concedes every alternate section "of land designated by odd numbers for ten sections in width on each side of said road and each of its branches."

The first section further provides, that when lands thus granted have been sold, reserved, or otherwise appropriated, or the rights of pre-emption or homestead settlements have attached, other lands designated by odd numbers, in no case to be located further than twenty miles from the lines of said roads and branches, shall be selected by direction of the Secretary of the Interior.

The second section requires the reserved (even) sections within the

ten mile limits to be sold at not less than double the minimum price of the public lands. No such section can, however, be sold at private entry until after it shall have been first offered at or above the increased minimum price: "*Provided*, That actual and *bona fide* settlers, under the provisions of the pre-emption and home-
65 stead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: *And provided also*, That settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres, anything in this act to the contrary notwithstanding."

The Senators and Representatives in Congress from Kansas having requested the withdrawal of the lands along the lines or routes of the railroads and branches provided for in this act, I enclose a diagram showing the probable lines of said roads and branches, with the ten-mile limits on each side (colored green), and you are hereby directed to withhold from ordinary *private sale or location, and also from pre-emption and homestead, with the qualification hereinafter indicated*, all the public lands in your district and lying *within the ten-mile limits*, as designated on said digram. Where said limits pass through the surveyed lands, the register will proceed at once to lay down in lead pencil, *on the township plats, the ten-mile limits* of
66 the reserve on each side thereof, and make the proper notes thereon, showing that the lands embraced *within said limits are reserved from sale or entry*, and as the surveys progressed, and the township plats are received, he will proceed in like manner to lay down the limits of reservation and make similar notes, and immediately report the same to this office, *so that this order may be strictly observed by withholding the lands in said limits.*

In virtue, however of the laws of 1853 and 1854, interests of two classes of settlers are provided for and protected, to wit:

1. By the said act of March 27th, 1854, (Vol. 10, p. 269,) pre-emptors, either upon the *odd* or *even* sections, who had actually settled before the receipt at your office of this order of withdrawal, have the right, upon establishing their claims according to law, to pay for them at $1.25 per acre, or, in virtue of the act of March 22, 1852, to locate the same with warrants.

2. In accordance with the said act of March 3, 1853, (Vol. 10, p. 244,) any pre-emptor who, *subsequent* to the receipt as aforesaid of the order of withdrawal and *prior* to the final allotment of the alternate sections to the railroad, may settle upon and improve the even numbered (not odd) sections, and who shall establish their pre-emptions according to law, have a right to do so before the same
67 are offered at public sale, rating the lands at $2.50 per acre, with the right to pay for the same in cash, or, as stipulated in the last proviso to the first section, act of March 22, 1852, (Vol. 10, p. 3,) to pay part in warrants at $1.25 and the residue in cash.

I would also call your attention to the first section of the home-

stead act, wherein it is provided "that any person," &c., &c., shall be entitled to enter one quarter-section, or a less quantity, of unappropriated public land, upon which said person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption, at $1.25, or less, per acre, or eighty acres or less of such unappropriated lands at $2.50 per acre, &c.

You will therefore understand from the foregoing—

1. *That the odd sections within the limits of the said railroads and branches are absolutely withdrawn from sale, pre-emption, or homestead entry,* except so far as inceptive rights may have accrued prior to the receipt by you of this order.

2. That under the provisions of the act- of 1853 and 1862 the *even* sections will only be subject to pre-emption at $2.50 per acre from that date, and dealt with at that ratability under the homestead.

This order will take effect from *the date* of its reception at
68 your office, and you will advise this office of the precise time it may be received by you.

Very respectfully, your obedient servant,

J. M. EDMUNDS, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April* 20, 1863.

SIR: I have considered your report of the 19th March, and your instructions of same date, proposed to be issued to the registers and receivers in Kansas for the withdrawal from sale, location, &c., &c., of the public lands along the probable routes of the railroads and telegraphs, to aid the construction of which a grant was made by act of Congress, approved 3d March, 1863.

I approve the withdrawal of the lands, and your proposed instructions to the land officers for that purpose.

I am, sir, very respectfully, your obedient servant,

J. P. USHER, *Secretary.*

To the Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C. *March* 8, 1872.

69 N. S. Goss, Esq'r, present.

SIR: I have considered your argument of 15th September last relative to the controversy between the Atchison, Topeka and Santa Fe Railroad Company and the Kansas Pacific Railroad Company involving the right to lands in conflicting limits of the two roads.

It is claimed by you that the Atchison, Topeka & Santa Fe Company are entitled to all the lands within their limits, and not within the ten mile limits of the grant to the Kansas Pacific Company established under the act of July 1, 1862.

The Kansas Pacific Company, on the contrary, claim all the lands within twenty miles of their road, under the acts of July 1, 1862, and July 2, 1864, without reference to the grant to the Atchison, Topeka & Santa Fe Company.

By letter of 17th July, 1862, and pursuant to the requirements of the act of July 1, 1862, granting lands for the Kansas Pacific, then Leavenworth, Pawnee & Western Railroad Company, the lands for fifteen miles on each side of the road were withdrawn from further disposal. An additional grant was made by act of July 2, 1864, and the lands withdrawn. On March 3, 1863, a grant of lands was made for the Atchison, Topeka & Santa Fe Railroad, and the lands were withdrawn by order of March 19, 1863.

70 Each grant is of land not sold, reserved, or otherwise disposed of at the date of the definite location of the road. Hence, at the date of withdrawal for the Atchison, Topeka & Santa Fe road, in 1863, the lands for fifteen miles on each side of the Kansas Pacific road had been already withdrawn, and were reserved, and have since so remained. Consequently, under the terms of the act of 1863, and the decision of the Supreme Court and the Department, they were excluded from the grant for the Atchison, Topeka & Santa Fe road.

Holding the decisions of the Department and the terms of the withdrawal in view, it is my opinion that the Atchison, Topeka & Santa Fe Railroad Company are not entitled to any lands within fifteen miles of the Kansas Pacific road, because they were reserved at the date of the grant of 1863, and the definite location of the road thereunder; and that the Kansas Pacific Company are not entitled to any lands outside of said fifteen-mile limits and within the twenty-mile limits, under act of 2d of July, 1864, which fall within the ten-mile limits of withdrawal of March 19, 1863, for the Atchison, Topeka & Santa Fe road, because they were reserved at the date of the passage of the said act and the definite location of the road.

71 The Department has further held that the company who shall first comply with the requirements of its grant in the definite location of their road are entitled to all the lands *granted*, without reference to the conflicting limits of any other road which may not have preceded theirs in definitely locating their line.

The Kansas Pacific Company definitely located their line to Fort Riley, on and prior to 16th February, 1865, while the Atchison, Topeka & Santa Fe Company did not locate their line until 1866; therefore the lands within the twenty-mile limits of the first-named company and outside of the ten-mile withdrawal of 1863 for the latter company enure, so far as said latter company is concerned, to the Kansas Pacific Railroad grant.

The deflection of the constructed line of the Atchison, Topeka & Santa Fe road from the line of definite location, to which reference is made in the argument of the attorney for the Kansas Pacific Company, does not, I think, materially affect the question, and therefore has not been considered in forming my opinion.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

WASHINGTON, D. C., *April* 30, 1872.

HON. WILLIS DRUMMOND,
72 *Commissioner of the General Land Office.*

SIR: The Kansas Pacific Railroad Company, within the usual time, (sixty days,) respectfully appeals from the decision rendered by you on the 8th ultimo, in a letter to N. S. Goss, Esq., attorney of the Atchison, Topeka and Santa Fe Railroad Company, of which a copy was furnished me in your letter of the 12th of the same month, and assigns for cause of appeal the following reasons: Because—

1. The Kansas Pacific Company, claiming under the grant by act of July 1, 1862, and July 2nd, 1864, definitely fixed its route of road opposite the lands in contest before the route of a road was definitely fixed by the State of Kansas, (under which the Atchison, Topeka & Santa Fe Company claimed,) under the act of 3d March, 1863.

2. The Kansas Pacific Company fully completed its road opposite said lands, and the same was accepted by the President of the United States prior to the location and construction of a railroad by the State of Kansas, under said last-mentioned act of Congress.

3. The State railroad, competing for the lands so acquired by the Kansas Pacific Railroad Company, does not extend, as the
73 act of Congress requires, "from Atchison *via* Topeka to the western line of the State, in the direction of Fort Union and Santa Fe," but extends from Emporia to Topeka. The State has acquired no lands in the middle portion of a line of route before it has built a road from the initial point, as stipulated by Congress.

4. The Kansas Pacific Company, having surveyed and located its line opposite these lands prior to July 2, 1864, the grant of that date vested the lands in contest to said company. At that time the State had not set a compass or stuck a spade upon its road from Topeka to Emporia.

5. The route of the State said road, authenticated by the Governor's certificate of December 27, 1870, was not located before 1869 or 1870, and as *that is the only valid and authentic route binding upon the State and the United States*, all the preliminary surveying and mapping by the Atchison, Topeka & Santa Fe Company is of no validity, but is superseded by the maps of the State road as built.

The line so authenticated by the Governor *is the only one on which the grant can be* legally adjusted, and the right of the State to specific lands did not vest until the final location of said line was made and approved by the State officers.

74 No route had been or could have been "definitely fixed" by the Atchison, Topeka & Santa Fe Company. The State alone had power to "definitely fix" the route of a road, and the State did not do this until the year 1870.

6. Your office erred in holding that the withdrawal of March 19, 1863, on a line from Atchison by Topeka and Council Grove inures to the benefit of the State for a road from Topeka to Emporia. The general route then indicated has been totally abandoned by the subsequent act of the State in locating another line.

In support of the foregoing points, I respectfully refer to my argument filed in your office in November last, and to the records of your office, and of the Department, relating to the definite location and construction of the roads of the contesting parties.

Very respectfully, your obedient servant,

HENRY BEARD,
Attorney for the K. P. R. R. Co.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February* 12, 1873.

SIR: I have considered the appeal taken by the former company from your adverse decision of March 8th in the case of The Kansas Pacific Railroad Company *vs.* The Atchison, Topeka and Santa Fe Railroad Company.

75 The appeal arises on questions not argued before you and covered by your decision.

I agree with you in your conclusions at which you have arrived, and affirm your decision.

The papers in the case transmitted with your letter of October 25 are herewith returned.

Very respectfully,

C. DELANO, *Secretary.*

HON. WILLIS DRUMMOND,
Com'r Gen. Land Office.

Endorsed: No. 1708. The Kansas Pacific R'w. Co. *vs.* A., T. & S. F. R. R. Co. Filed June 16, 1881. A. S. Thomas, clerk. By W. W. Gelatt, deputy.

And on this day, to wit, June 16, 1881, in the June term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Decree.

Circuit Court of the United States, District of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

76 This cause having heretofore been submitted upon the bill, answer, and agreed statement of facts filed in this cause and made a part of the record thereof, upon due consideration of the same it is ordered, adjudged, and decreed that the complainant's bill be dismissed, and that the defendant recover of the complainant its costs in this behalf to be taxed.

And now, here, the parties appearing in this cause the complainant prays an appeal to the Supreme Court of the United States from the above decree, which is by the court now here allowed upon filing bond, as required by law, in the penal sum of five hundred dollars with J. P. Usher, surety, who is by the court approved.

C. G. FOSTER, *Judge.*

Endorsed: No. 1708. Kans. Pac. R. W. Co. *vs.* A., T. & S. F. R. W. Co. Decree. Filed June 16th, 1881. A. S. Thomas, clerk. By W. W. Gelatt, deputy.

And on this day, to wit, July 21, 1881, there was filed in the clerk's office of said court, in said entitled suit, an appeal bond, which said bond is in the words and figures following, to wit:

77 *Appeal Bond.*

Supreme Court of the United States.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.

Know all men by these presents, that I, J. P. Usher, of Lawrence, Douglas county, Kansas, am held and firmly bound unto The Atchison, Topeka and Santa Fe Railroad Company in the sum of five hundred dollars, to be paid to the said Atchison, Topeka and Santa Fe Railroad Company, its successors or assigns; to which payment, well and truly to be made, I bind myself and my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with my seal, dated this 19th day of July, 1881.

Whereas the above-named Kansas Pacific Railway Company has taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of this obligation is such, that
78 if the above-named Kansas Pacific Railway Company shall prosecute its said appeal to effect, and shall answer all costs, together with just damages for delay, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

J. P. USHER. [SEAL.]

Approved July 21, 1881.
C. G. FOSTER, *Judge.*

Endorsed: No. 1708. Kansas Pacific R'l'y Co. *vs.* Atchison, Topeka & Santa Fe R'l'y Co. Appeal bond. Filed July 21, 1881. A. S. Thomas, clerk.

79 UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of the record of all the proceedings in the suit of The Kansas Pacific Railway Company *vs.* The Atchison, Topeka & Santa Fe Railroad Company, No. 1708, in said court.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court, at my office in Topeka, in said district of Kansas, this 13 day of August, A. D. 1881.

[SEAL.] A. S. THOMAS, *Clerk.*
By W. W. GELATT, *Deputy.*

Endorsed on cover: Kansas C. C. U. S. No. 380. The Kansas Pacific Railway Company, appellant, *vs.* The Atchison, Topeka & Santa Fe Railroad Company. Filed October 10, 1881.

112-414

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1883.

No. 380.

THE KANSAS PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF J. P. USHER FOR APPELLANT.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1883.

No. 380.

THE KANSAS PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

This is a suit in equity brought here on appeal from an adverse decree of the Circuit Court in Kansas. The object of the suit is, to have a decree entered, declaring that the appellee has wrongfully accepted evidence of title to more than five thousand acres of land, situate in Wabaunsee and Osage counties, Kansas, which were granted by Congress to the appellant, and which are worth more than ten thousand dollars; and that the appellee be decreed to convey said lands to appellant.

STATEMENT OF FACTS.

In the transcript of the record in this suit, commencing at page 23, and ending on page 28, will be found an agreed statement of all the facts in the case.

which, by the agreement, are to be taken, in this court, as the facts in the case, without regard to allegations, admissions, and denials in the pleadings. It does not seem necessary to copy that statement at length in this brief, as it can be readily referred to in the record.

The acts of Congress upon which the title of the appellant rests are:

Act of July 1, 1862, *12 Stat., 489.*
Act of July 2, 1864, *13 Stat., 356.*
Joint resolution of May 7, 1866, *14 Stat., 355.*
Act of July 3, 1866, *14 Stat., 79.*

Reference is made to the joint resolution of May 7, 1866, only for the purpose of showing that Congress extended the time for the completion of the first one hundred miles of railroad of the appellant until the 27th day of June, 1866; and then the resolution goes on to say, "and that the time for completing each succeeding section of one hundred miles shall be reckoned from the said 27th day of June in said year," but as no question has arisen or can arise in this suit, that the appellant has forfeited the grant, it does not seem necessary to set the joint resolution out at length.

With the general purpose of the act of July 1, 1862, and the amendatory acts of July 2, 1864, and July 3, 1866, this court has necessarily become familiar. The particular sections and parts of sections in those acts, necessary to be considered and construed in this suit, are as follows:

ACT OF JULY 1, 1862.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company for the purpose of aiding in the construction of said railroad and tele-

graph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed:

* * * * * * * * *

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any portion of said railroad or telegraph line ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad—the rails and all the other iron used in the construction and equipment of said road to be of American manufacture of the best quality,—the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said land to said company, on each side of the road, as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. * * * * * * *

Section 7, after providing for the acceptance of the act, has the following proviso:

Provided, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be

withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named:

ACT OF JULY 2, 1864.

SEC. 4. *And be it further enacted*. That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five. And the term "mineral lands," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. *And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands.* * * *

ACT OF JULY 3, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, is hereby authorized to designate the general route of their said road, and to file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: * * * * * * * *

The "*purposes*" referred to in section 7 of the act of 1862, are briefly stated in the title of the act, and the same purposes are deduced from the general provisions

in said act contained, viz.: "To aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes."

Briefly, the statutory direction to the Secretary of the Interior in said section 7 is, first to withdraw the lands to satisfy the grant; and second, to survey and set off the granted tracts as fast as the company should be entitled to receive patents for them, under the provisions of the fourth section of the act.

This statutory direction was obeyed, as appears by the agreed statement (article 10, record print, page 25.)

"On February 6th, 1866, said location (referring to the location of the road defined in the preceding article) was approved by the Commissioner of the General Land Office, and by instructions dated February 16th, 1866, the odd-numbered sections of land, within twenty miles of complainant's railroad were withdrawn from sale and reserved for the use of complainant."

Thus it is agreed that these lands in controversy were, pursuant to law, reserved for complainant's use.

By article 11 of the agreed statement (record print, page 25.)

"The complainant's railroad along and adjacent to the lands in controversy was duly completed, and accepted by the President, on or before December 14th, 1866, and the President by executive order, directed the Secretary of the Interior to cause patents to be issued to the complainant for the lands enuring to said grant."

The claim of the appellee is founded upon an act of Congress approved March 3, 1863, (*12 Stat., 772.*)

The part of that act to be considered by the court, in this suit, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction: First. * * * * * * *

Second, of a railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fe, New Mexico. * * * * * * *

every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road, But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached, as aforesaid; which lands, thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: * * * * *

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side or said road and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been

first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid; *Provided*, That actual and *bona fide* settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: *And provided also*, That settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

By article 2 of the agreed statement, (record print, page 25) it is stipulated that the appellee's claim is founded upon the said act of Congress of March 3, 1863, and by articles 4 and 16 (record print, pages 26 and 28), that the lands in controversy were withdrawn in manner specified in exhibit A. Turning to that exhibit (record print, pages 29, 30 and 31) the order of the commissioner of March 19, 1863, to the local land officers at Humboldt, Kansas, is set out. The summary of his order (record print, page 31) is as follows:

"*You will therefore understand from the foregoing—*

1. That the odd sections within the limits of the said railroads and branches are absolutely withdrawn from sale, pre-emption or homestead entry," * * *

The reason for making this order is given (record print, page 30.) The commissioner says:

"The Senators and Representatives in Congress from Kansas having requested the withdrawal of the lands along the lines or routes of the railroads and branches provided for in this act, I enclose a diagram showing

the probable lines of said roads and branches, with the ten-mile limits on each side (colored green), and you are hereby directed to withhold from ordinary *private sale or location, and also from pre-emption and homestead, with the qualification hereinafter indicated*, all the public lands in your district and lying *within the ten-mile limits*, as designated on said diagram." See request of Senators and Representatives. (Record print, page 29.)

This order of the commissioner was approved by the Secretary of the Interior April 20, 1863. (Record print, page 31.)

By article 10 of the agreed statement (record print, page 27), it is stipulated that the lands in controversy are situated "between the ten and twenty mile limit of grant of lands to the State of Kansas for defendant's line of railroad, and within twenty miles of said defendants's said line of railroad *as definitely located*," *and actually constructed*.

And then by article 14 (same page) it is stipulated that these lands in controversy were selected by the Secretary of the Interior as indemnity lands.

Thus it will be seen by the agreement that defendant's railroad was not definitely located or actually constructed upon the "probable" line designated upon the diagram of the commissioner, who "shot wide the mark" ten miles or more.

It appears by article 5 of the agreed statement (record print, page 26), that the appellee filed a map of definite location of its road between Topeka and Emporia, January 1, 1866, the line of which was within twenty miles of the land in controversy; by article 13 (record print, page 27) that the line of defendant's road con-

structed, varied from the line shown on the map of location of January 1, 1866, in some cases a mile, and that on October 6, 1868, another map was filed, and that in 1870 still another map was filed showing additional variations. All these maps purported to be of definite locations.

By article 14 (same page) it appears that when the line of defendant's railroad was definitely fixed, which, according to article 13, was sometime in 1870, it was found that the right of pre-emption and homestead settlement had attached to a large portion of the lands, and that the United States had reserved for other purposes, large portions of the land enuring to the State of Kansas under the grant of March 3, 1863, and that the Secretary of the Interior selected all the lands in controversy to make up the deficiency.

ERRORS ASSIGNED.

The appellant alleges that the Circuit Court erred in rendering a decree dismissing the bill.

The decree is set out on page 34 of the printed record.

The errors of the Circuit Court were:

I. In holding that the order of the commissioner, March 19, 1863, withdrawing the lands in question from market, was authorized by law.

II. In holding that the lands in controversy were, on the 30th of April, 1863, reserved by the United States, by virtue of said order, so as to exempt them from the enlarged grant to the appellant by the act of July 2, 1864.

III. In holding that the lands in controversy were within the ten mile limits of the grant to the State of Kansas, by the act of Congress of March 3, 1863.

IV. In finding and decreeing, against the appellant, that the lands in question were not embraced within the grant to it, under the acts of Congress of July 1, 1862, and July 2, 1864, and in not making an affirmative decree in its favor as prayed.

ARGUMENT.

The right of the appellant to the lands in cont.oversy is founded upon the acts of Congress of July 1, 1862, and July 2, 1864. The parts making the grant are hereinbefore set out.

Upon the passage of the act of 1864, it became the duty of the Secretary of the Interior, under section 7 of the act of 1862, to reserve these lands from sale, the fact being that the lands are in the five mile strip beyond the first limit of withdrawal of fifteen miles; however, the lands were, by the law, granted the appellant upon the passage of the act, no matter whether the secretary made further order or not. *Van Wyck* v. *Knevals*, *106 U. S., 360.*

The lands having been withdrawn pursuant to the Union Pacific Railroad acts, the appellant proceeded to definitely locate its road, and such location was completed opposite the lands in controversy, February 4, 1865, as shown by article 9 of the agreed statement (record print, page 24), and upon filing its map of definite location, January 10, 1866, these lands were identified as enuring to the grant, and upon the completion of the road, and the acceptance of the same by the President on the 14th day of December, 1866, the condition of the grant was performed and the appellant was entitled to a patent for the lands upon the payment of fees, which were paid and tendered in November, 1870, as appears by article 12 of the agreed statement (record print, page 25)

Observe, the map filed January 10, 1866, showed upon its face, the exact day the road was definitely located contiguous to these lands, viz.: February 4, 1865.

By article 9 of the agreed statement, (record print, page 24) it is stipulated that this map showed, by flag-staffs marked thereon, and the certificates and affidavits annexed thereto, the dates of the actual location of the various parts of appellant's railroad, according to, and in compliance with the instructions of the Secretary of the Interior, and by article 10 (record print, page 25), that this map was, on February 6, 1866, approved by the Commissioner of the General Land Office This approval affirmed the date of location to have been February 4, 1865, as shown on the map. And the Commissioner, Drummond says (record print, page 32), in his decision upon the conflicting claims of the companies :

"The Kansas Pacific Company definitely located their line to Fort Riley on and prior to 16th February 1865, while the Atchison, Topeka & Santa Fe Company did not locate their line until 1866."

To avoid confusion and error in respect to the dates of definite location of the two roads, attention is called to article 5 of agreed statement (record print, page 26), the latter clause of which says, that on the 1st day of January, A. D. 1866, the said defendant caused a map of its road or definite location from Topeka to Emporia, and adjacent to and within twenty miles of all said lands in controversy, to be filed as required by law, duly authenticated and certified to. Now it does not appear when the definite location shown by this map was actually made, and it cannot be assumed or presumed that it was made any length of time before the filing of the map. The line of definite location was afterwards changed as shown by article 13 (record print, page 27) and upon that line, as changed, the road was constructed and the land grant, under the act of March

3, 1863, adjusted to it. It must also be borne in mind that the Land Department did not approve the map first filed, and the presumption is that if it had been done, the appellee would have taken care to make it appear in the agreement. The presumption is that it was not approved. It is also to be presumed that the map of definite location last filed was approved, because the grant was adjusted to it.

Thus it conclusively appears that the definite location of appellant's line of road, which was afterwards approved, was made nearly a year before the appellee has any evidence of location.

By article 15 of the agreed statement (record print, page 28), it is stipulated that the appellant had done everything necessary to be done under the law, to entitle it to a patent for the lands, and by article 12 (record print, page 25) that the Commissioner of the General Land Office refused to execute the law in favor of the appellant, because it had been determined in the Department of the Interior that the State of Kansas was entitled to the lands.

THE LANDS DID NOT ENURE TO THE GRANT TO THE STATE OF KANSAS.

In considering that grant, its terms are to be carefully examined, the rule of law being, as expressed by Mr. Justice Davis, in considering this same act in *Leavenworth, &c., R. R. Co.* v. *U. S.*, *92 U. S.*, *740*, that the grant "does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The interpretation must be reasonable and such as will

give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but, if they admit of different meanings,—one of extension, the other of limitation,—they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly, or by necessary implication, is withheld."

That this was a conditional grant of only these odd numbered sections of lands, within ten miles of a road afterwards to be located, which had not, at the date of such grant, been sold, reserved, or otherwise disposed of, is plain. It was a present grant of such odd numbered sections, to take effect immediately upon the definite location of the road; and where either of said sections or any part thereof had been sold, *reserved, or otherwise disposed of by the United States* between the date of said grant and the date of definite location of said road then other lands in lieu thereof were to be selected, within a limit of ten miles beyond the grant to the State. The lands in controversy were beyond the grant and were selected by the Secretary of the Interior as indemnity lands, and certified to the State.

Now these lands attached to the grant to the appellant, on the passage of the act of July 2, 1864. They were then, by that law, reserved.

But returning to the grant to the State; these indemnity lands were not included in the *present grant* of the act of March 3, 1863. It is clear that, only as to the

lands within the ten mile limits was the grant *in praesenti.* Note the words of the act:

"There be, and is hereby granted, * * * every alternate section of land, designated by odd numbers, for *ten sections* in width on each side of said road."

The claim of the appellee is based upon the following words in the act:

"But in case it shall appear that the United States have, *when the lines or routes of said road and branches are definitely fixed*, sold any section or any part thereof, GRANTED AS AFORESAID, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, *then* it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached, as aforesaid; *which lands, thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid.*"

Observe that the act does not give indemnity for lands not granted, but only for lands actually "granted as aforesaid," and which might be sold, reserved, or otherwise disposed of between the date of the grant and the date of definite location of the road, or to which pre-emption or homestead settlements might have attached at any time before the definite location of the road, and not consummated before the date of the grant.

The words in the act "GRANTED AS AFORESAID," refer to, and include only such lands as were owned by the United States at the date of the grant, and were not excepted by the grant, and which should

be found within ten miles of defendants railroad as finally located. *Leavenworth, &c., R. R. Co.*, v. *U. S.*, *92 U. S., 748.*

"Having thus given lands in place and by way of indemnity, Congress expressly declared, what the act already implied, that lands otherwise appropriated when it was passed, were not subject to it."

It follows that as to indemnity lands the grant was not *in praesenti*. There could be no indemnity for loss of lands, "granted as aforesaid," until the loss was ascertained, and this loss could not be ascertained until the road was definity located, and then by the act, compensation was to be made under the direction of the Secretary of the Interior by the selection of other lands in odd sections, nearest to tiers of sections within the grant, that is, within the ten mile limits. Clearly, until the selections were made, the lands selected would not be covered by the grant, or affected in any way by the act.

An inspection of the description of the lands (exhibits A and B to the bill, record print pages 6 and 7), will show that the lands in controversy certified to the State covered several tiers of sections. The law cast the duty upon the Secretary to direct the selections. To be sure they were to be made in sections and parts of sections nearest the tiers of sections granted, nevertheless the law left a choice, and it cannot be said that the location of the road gave precision to these selections, so as to enable the General Land Office, from its maps and plats, to ascertain what lands were to be taken as indemnity. The law left it to the Secretary to select the indemnity lands, which necessarily devolved the further duty upon him of deciding what lands were, and what were not, subject to be selected.

Upon this subject it may be said that it has been quite definitely decided that grants of indemnity lands are *in futuro*. Mr. Justice Miller, giving the opinion of this court in the case of *Grinnell* v. *R. R. Co*, *103 U. S.*, *739*, involving the construction of a statute quite similar to this, after construing grants of lands in place says, page 142:

"As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer."

Mr. Justice Field in declaring the opinion of this court in the case of the *Mo. &c. Railway Co.* v. *The K. P. Railway Co.*, *97 U. S. 491* says, page 497:

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. *To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and where no such power exists, instruments, with words of present grant, are operative, if it all, only as contracts to convey.* But the rules of the common law must yield in this, as in all other cases, to the legislative will."

Having already shown, that by the act, the Secretary had a discretion as to what lands he should select, in case the deficiency was to be supplied by the selection of a section or less out of a tier of sections subject to be selected from, and that he was to decide whether any particular section or tract was or was not, for any reason, included within the public lands, it is certain hat there did not at the date of the act of March 3,

1863, exist "a present power of identification of the lands" in controversy; and as was declared by this court, "where no such power exists, instruments, with words of present grant, are operative, it at all, only as contracts to convey."

Suppose the Secretary had refused to make the selection, could the courts have compelled him to act? or if they could, could they, by decree, name the tracts which he should select? The palpable answers to these questions are decisive of the question now under consideration, and establish the fact, beyond dispute, that the provision in the act for selecting the indemnity lands, was but an agreement to select and convey.

If this argument is correct, then it follows that the lands in question were granted to the appellant by the act of July 2, 1864. It is certain they were not, as lands in place, embraced in the grant to the State, of March 3, 1863.

Doubtless the learned Judge, who pronounced the opinion upon which the decree in this cause was entered, would have reached the foregoing conclusions, if he had not mistaken the facts in the case.

In stating the facts (record print, page 20,) the Judge said:

"The lands in controversy are within the limits of the enlarged grant to complainant, made by the act of July 2, 1864, but not within the limits of the orignal grant of 1862; that is to say, they are outside of fifteen miles limit, and are within the twenty miles limit. *They are also within the ten miles limit in the grant to the State; being in fact, at a point where the two grants cross each other.*"

In the agreed statement of facts, in no less than four articles, namely article 6, (record print page 24,) and articles 10, 13 and 14, (page 27,) it is stipulated that the lands are outside of the ten mile limit of the grant to the State, and by article 14, it is expressly stipulated that they were selected as indemnity lands; therefore it appears, beyond all contradiction, that the judge mistook the argreement.

This error of the judge was the misfortune of the complainant, inasmuch as his opinion was based upon the erroneous premises, and made it wholly unnecessary for him to consider whether, under the act of March 3, 1863, these lands, selected as indemnity, were a present grant by that act. It has been shown that they were not, but that they were selected under the executory agreement contained in the act.

The Order of Withdrawal of the Commissioner of March 19, 1863.

It is urged that these lands were excepted out of the grant to the appellant by that order.

That order was improvidently made; indeed it was in the very face of the act.

It has already been conclusively shown that, by the act of March 3, 1863, public lands, that might afterwards be found to fall within the grant, were subject to disposition under the existing laws of Congress until the road was definitely located, which by article 5 of the agreement could not have been before Jan. 1, 1866 (record print page 26), and most probably not until sometime in 1870. (See article 13 of the agreed statement, record print, page 27.)

It may be well here to quote again some words of the act.

"*But in case it shall appear that the United States have*, WHEN THE LINE OR ROUTES OF SAID ROAD AND BRANCHES ARE DEFINITELY FIXED, *sold any section or any part thereof*, GRANTED AS AFORESAID, *or that the right of pre-emption or homestead settlement has attached to the same*, OR THAT THE SAME HAS BEEN RESERVED BY THE UNITED STATES FOR ANY PURPOSE WHATEVER, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands *as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached*, AS AFORESAID; which lands, thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid."

The pertinent inquiry here is, whence the propriety of providing for selections of lands, by way of indemnity for lands sold, reserved, or otherwise disposed of by the United States, after the passage of the act, and before definite location of the road, if the lands found, upon definite location of the road, to have been granted by the act, were not, until such definite location, subject to entry under the homestead and pre-emption laws, or to be otherwise disposed of by the United States? Can there be but one answer to this? And yet the order of the Commissioner was to withdraw the lands "*from sale, pre-emption, or homestead entry*," nothing more.

Plainly this order was contrary to the law, and this action was condemned by this court in the case of *Leavenworth &c. R. R. Co.* v. *U. S.*, 92 *U. S.*, 748-9. The

decision in that case was upon this very act. It is said by this court in that case, in speaking of the indemnity clause, that it did not enlarge the grant already made.

It must be held that this order of withdrawal was improvidently made, and being directly in the face of the statute was absolutely void, and that qualified parties, desiring to make entry of these lands, under the homestead and pre-emption laws, could compel the General Land Office to admit their entries, notwithstanding the order. Moreover, it is unreasonable to suppose that the order would have been made by the Commissioner or approved by the Secretary, if but a casual inspection had been made of the act.

In the opinion of the Circuit Court, in this suit, undue effect was given to this order. It was held to be broader and more comprehensive than its terms import. The order was for a withdrawal of the lands "*from sale, pre-emption or homestead entry.*" The act of 1863 did not provide for any such order, but on the contrary, as has been shown, prohibited it; but giving it its largest scope, and assuming it to be a valid order, it did not prevent Congress from granting the lands to the appellant, and the act of 1863 already, quoted, plainly says that, if it should appear that the United States had, when the route of said road was definitely fixed, sold, reserved or otherwise appropriated the lands granted by the act, others should be selected. Now the appellee's road was not definitely located before January 1, 1866. Congress had granted these lands to the appellant July 2, 1864, and they were reserved to the appellant by the acts of Congress of July 1, 1862, and July 2, 1864. If these lands had not been certified to the State as indemnity lands, but had been within the ten mile limit fixed in the grant, the appellee could have

had indemnity for them, because they had been reserved and appropriated for the appellant by the United States, after the date of the act of 1863 and before the definite location of appellee's road. Situated as they were, the appellee could make no claim to them until after definite location of its road, and then the lands had been absolutely reserved and disposed of by act of Congress.

It is absolutely certain that not even a pretext can be found in the several acts of Congress, upon which the contention of the appellee can be based, to justify its right to these lands.

The Circuit Court fortified its opinion by invoking the decision of this court in case of *Wolcott* v *Des Moines Co., 5 Wall., 681.* In the annals of this court, no decision has been made, that has been subjected to harder service than this. It requires but a casual examination of that decision, to see that it has nothing in the world to do with this case.

The question involved in that case was, whether a proviso, found in an act of Congress, granting lands to the State of Iowa in aid of railroads, excluded from the grant, lands which had been before erroneously reserved in aid of the Des Moines river improvement. The said proviso is as follows:

"That any and all lands heretofore reserved to the United States by any act of Congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any purpose whatsoever*, be and the same is hereby reserved from the operation of this act, except so far as it may be found necessary to locate the routes of the said railroads through such reserved lands, in which case the right of way shall be granted subject to the approval of the President."

This proviso is copied from the opinion of Mr. Justice Nelson in the Wolcott case, (page 687) and the

italics are his. The decision proceeded upon the force of these italicized words. Further along (page 688) this eminent judge said:

"The words of the proviso point almost directly to this grant, and the dispute arising out of it among the public authorities: 'All lands heretofore reserved' &c. 'by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements' &c. These improvements of the Des Moines River were then in progress. Now, if it had turned out that the true construction of the act carried the grant above the Raccoon Fork, then the lands would have been reserved by act of Congress, and no further legislation necessary. But, not satisfied with this, as if to provide for any result in respect to the title to them, if reserved in any other manner by competent authority, for the object of internal improvements, then the enacting clause should not operate to carry them under the new grant."

And then the decision goes on and declares that the reservation by the Secretary of the Treasury, when the land was under his department, was by competent authority. The lands had been reserved by the Secretary under the Des Moines River grant. It was the only reservation which had been made when the proviso was passed. The italicized words in the proviso referred to it, or they were vain and senseless. This court decided that they did refer to this reservation, and in holding that, decided that the lands *had not been reserved by act of Congress*, for the court held in that decision that, if the lands had been thus reserved further legislation was unnecessary. Thus far the decision is palpably favorable to this appellant, as the court will readily see by reference to section 3, of the act of July 1, 1862, and section 4, of the act of July 2, 1864.

The Circuit Judge in his decision assumes that the irregular and illegal withdrawing of these lands by the Commissioner was a reservation by act of Congress. This he was compelled to do or decree the lands to the appellant. The act of Congress granted the lands to the appellant if they had not been reserved by the United States, before they were reserved and withdrawn for the appellant by the act of 1864. The limitation upon the grant is entirely different from the limitation in the proviso to the Iowa grant. If in section 3, of the act of 1862, the words in the proviso of the Iowa act had been interpolated, it would have read,

"That there be, and is hereby, granted to the said company * * every alternate section of public land designated by odd numbers, * * * * * * * not sold, reserved or otherwise disposed of by the United States, *or in any other manner by competent authority for the purpose of aiding in any objects of internal improvements.*"

To say that the withdrawal in this case was a reservation or disposition by the United States, is a palpable perversion of reason and law. As before shown, the withdrawal was contrary to the act of Congress of March 3, 1863, and being contrary to law was an utter nullity, and must be held to have been unknown to Congress when the act of July 2, 1864, was passed. At any rate it was in no manner recognized by Congress. By section 4, of the act of 1864, making the enlarged grant, only these words of limitation occur:

"And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands."

Words would be wasted in contending that the lands in question were a government reservation or mineral

lands. The grant was of "public land." See sectiro 3 of the act of July 2, 1862; and by section 4 of the act of 1864, the grant was not to defeat or impair a lawful claim. It is conceded by all that the lands in controversy were public lands, at the date of the grant to, withdrawal for, and definite location of appellant's road, that they are situated within the limits of appellant's grant, and it must be held that the Secretary of the Interior should have caused patents to be executed to appellant, unless by so doing it would have defeated a lawful claim.

The contention of the appellee is, that at the time of the executive order, to cause patents to be issued to appellant, it had such lawful claim. This order was made December 14, 1866, (article 11 of agreed statement, record print, page 25).

Now, at that date, the appellee had only the possibility of a claim; the lands being outside of the grant to it, of lands in place, its right to these lands depended wholly upon the volition of the Secretary, to be exercised in the selection. So far from it having a lawful claim to the lands, the agreement does not show that it had any claim whatever to them. The Supreme Court of Nebraska in a decision touching indemnity lands, *Vance* v. *B. & M. R. R. Co., 12 Neb., 285*, says:

"As to these deficiency lands it is doubtless true that no right attached in favor of the company until definite selections by numbers were made, there being no other available means of designating them or knowing that they were claimed under the grant"

So this court held in *Ryan* v. *R. R. Co., 99 U. S., 386*, under a somewhat similar grant:

"Under this statute when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and

absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

Since then the appellee had no claim to these lands, much less a lawful claim, the claim of the appellant that the lands were granted to it, by the act of July 2, 1864, must be allowed.

That grant did not defeat or impair any lawful claim of the appellee.

The circuit court did not affect to decide that it did, but based its decision upon the erroneous supposition that the lands were within the ten miles limit of appellee's grant, and at the crossing of the two roads, whereas the lands are at least twenty miles from the crossing and more than ten miles from any part of appellee's road. The learned judge assumed that the lands were within the grant to appellee and were lawfully withdrawn, in other words, that they had been reserved by Congress before the act of 1864; and here again the decision in Wolcott's case, is made to do service. As before stated, that decision was made of a grant in place, and had it extended above Raccoon Fork, it would have been one equal moiety, in alternate sections, of the public lands, in a strip five miles in width on each side of said river. As to such a grant, this court said that it was competent for the Land Department to reserve from sale, the lands embraced in the grant, and yet that case was supposed to furnish authority for the Land Department to withdraw lands in aid of the construction of a railroad, whose route was not defined, between Topeka and some point on the western line of the State of Kansas, in the direction of Fort Union and Santa Fe, New Mexico. As before stated the commis-

sioner had "shot wide the mark" ten miles, when the line suggested by him, in his office at Washington, had extended but twenty miles from Topeka. Need anything further be said to show that the decision in Wolcott's case furnishes no support for such act? It has already been shown that the terms of withdrawal were but partial, that the commissioner did not pretend to reserve the lands from the direction of Congress, and that his act, giving it the widest scope and latitude in which the imagiantion can indulge, would not have excluded these lands from the grant to appellant under the acts of July 1, 1862 and July 2, 1864.

Neither the Commissioner or the Secretary could exercise any power not given by Congress. The grants to the appellant were of the public lands not sold, reserved, or otherwise disposed of by the United States. No matter what the Secretary or the Commissioner did, they were not the United States.

It can hardly be expected that the appellee will urge, that this court has not the power to declare the right of appellant to the land, because such right has been ignored in the Interior Department; yet appellee insisted upon having article 8, (record print, page 26.) inserted in the agreed statement, and may set up such claim, if so, the decision of this court in *Johnson* v. *Towsley*, *13 Wall*, *72*, most effectually disposes of it.

J. P. USHER,

Solictor for Appellant.

112-414

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 68.

THE KANSAS PACIFIC RAILWAY COMPANY, *Appellant*,

vs.

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

ADDITIONAL BRIEF FOR APPELLEE.

A. T. BRITTON,
J. H. McGOWAN,
A. B. BROWNE,
Att'ys for Appellee.

JAMES HAGERMAN,
Of Counsel.

TOPEKA, KANSAS:
KANSAS PUBLISHING HOUSE,
1884.

IN THE SUPREME COURT

OF THE UNITED STATES.

THE KANSAS PACIFIC RAILWAY COMPANY, *Appellant*,

vs.

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY, *Appellee*.

ADDITIONAL BRIEF FOR APPELLEE.

In addition to our former brief, we submit the following distinct proposition, which we believe to be unassailable. and, if sustained by the court, conclusively settles this case in our favor:

THE SANTA FÉ COMPANY IS ENTITLED TO THE LANDS IN CONTROVERSY BY REASON OF THE PRIORITY OF ITS GRANT.

Its grant is dated March 3, 1863. The grant to Union Pacific Co., under which Kansas Pacific Co. claims title, is dated July 2, 1864. The grant to the Santa Fé Co. was made to the State of Kansas in the first instance. The grant to the Union Pacific was direct to the company. The Legislature of Kansas, by an act, dated February 9. 1864, accepted the act of Congress, dated March 3, 1863, and in section 3 thereof, agreed to grant, bargain and sell these lands

to the Santa Fé Company, in consideration that it should construct its railroad from the city of Atchison, *via* Topeka, to the west line of the State. On February 16, 1864, the Santa Fé accepted the act of the Legislature of Kansas, of February 9, 1864.

Thus, prior to the grant to the Union Pacific, these lands were granted, or contracted to be granted, by the United States to the State of Kansas, and by the State to the Santa Fé Company. By these acts of Congress, and of the State, and by the acceptance thereof, the Santa Fé Company acquired vested rights by way of contract, which could be defeated only by non-compliance with the conditions of the laws. This company went forward, constructed its road without laches, and earned these lands. The Secretary of the Interior certified them to the State, and the State patented them to the company, and it is now in possession of them. The Kansas Pacific now comes and seeks to take them away, claiming them under a subsequent grant from the United States. It would be strange if, under these facts, it should be held that the Santa Fé has no title. It would be a sad commentary on the justice of the Government, if, having granted or agreed to grant these lands to one company, without cause—that is, without any delinquency on the part of its grantee—it withdraws the grant or the agreement to grant, and confers the lands by a new grant to a rival company. It is not possible that the Kansas Pacific Co. for a moment can have any standpoint from which to claim these lands, unless it can show that in the grant to the State of Kansas for the use of the Santa Fé company there was an express reservation of the right of the Government to make another grant of these lands for the same general purposes to another railroad company. That there was no such reservation, is a proposition on which we could safely rest this case.

This brings us to a close examination of the grant to the State of Kansas of March 3, 1863. This act, when accepted by the State, became a compact as solemn as a contract between individuals, or a treaty between nations. It was to be carried out in good faith, according to its letter and spirit. One sovereign was dealing with another, having in view benefits to flow to the public at large from the acts to be done by the recipients of the bounty given and promised. Kansas was a new State, recently admitted to the Union, and sparsely settled. Millions of acres of wild lands lay within her borders belonging to the General Government, and in order to facilitate transportation and to build up the interests of the State, and to invite people from abroad to settle within her limits, the act of March 3, 1863, was passed. The first section, among other things, provided: "That there be and is hereby granted "to the State of Kansas, for the purpose of aiding in the con- "struction" . . . "of a railroad from the city of Atchi- "son *via* Topeka, the capital of said State, to the western line "of the State," etc., "every alternate section of land, desig- "nated by odd numbers, for ten sections in width on each side "of said road." And further: "But in case it shall appear "that the United States have, when" the line or route of said road is "definitely fixed, sold any section or any part thereof, "granted as aforesaid, or that the right of preëmption or home- "stead settlement has attached to the same, or that the same "has been reserved by the United States for any purpose what- "ever, then it shall be the duty of the Secretary of the Interior "to cause to be selected for the purpose aforesaid, from the pub- "lic lands of the United States nearest to tiers of sections above "specified, so much land, in alternate sections or parts of sections, "designated by odd numbers, as shall be equal to such lands "as the United States have sold, reserved, or otherwise ap- "propriated, or to which the rights of preëmption or home-

"stead settlement have attached as aforesaid, which lands, "thus indicated by odd numbers and selected by direction of "the Secretary of the Interior, shall be held by the State of "Kansas for the use and purpose aforesaid: *Provided*, That "the lands to be so selected shall in no case be located further "than twenty miles from the line of said road: *Provided* "*further*, That the lands hereby granted for and on account "of said road shall be exclusively applied in the construction "of the same, and for no other purpose whatever, and shall "be disposed of only as the work progresses through the "same, as hereinafter provided in this act: *Provided, also*, "That no part of the land granted by this act shall be applied "to aid in the construction of any railroad or part thereof, "for the construction of which any previous grant of land "or lands may have been made by Congress: *And provided* "*further*, That any and all lands heretofore reserved to the "United States by any act of Congress, or in any other man- "ner by competent authority, for the purpose of aiding in any "object of internal improvement, or for any other purpose "whatsoever, be, and the same are hereby reserved to the "United States from the operations of this act, except so far "as it may be found necessary to locate the route of said "road . . . through such reserved lands; in which case "the right-of-way only shall be granted, subject to the ap- "proval of the President of the United States."

From the act as above cited it clearly appears that there was:

1. A grant of quantity of lands, ten alternate sections per mile, to be taken in the first instance from lands within ten miles of each side of the railroad; and secondly, if there was a deficiency at time the line was definitely fixed, the same to be taken within twenty miles of the road from alternate sections nearest to tiers of sections in ten-mile limits.

2. The selection of the lands to make up deficiency was to be made by the Secretary of the Interior, not by the State or the railroad company, and the selection was to be made from ascertained and specific limits and sections.

3. These lands were to be applied exclusively in the construction of the aided road.

4. These lands could not be applied, even by the State, to the aid of a road that had received previous aid either in lands or bonds. The Union Pacific was within this prohibition.

5. It was not intended to give or promise any lands which had been previously granted or promised to some one else.

The whole scope and purport of the section quoted shows that it was intended to grant a certain quantity of lands within specified limits, and they were to be appropriated to no other purpose. It is entirely immaterial, in our view, whether the lands within the ten-mile limits are to be construed as a grant *in præsenti*, and those within the twenty-mile limits as a contract or promise to convey. The law promised these lands to our company. They belonged to the United States at the time the company agreed to comply with the terms of the law and thus earn them. The right to them was vested from the time the company accepted the act of the State. The lands were not identified, perhaps, until the route was definitely fixed, but they were susceptible of identification, those within the twenty-mile limits as readily as those within ten miles. That is certain which can be made certain. The definite location of the route made certain the grant as to lands within ten miles, and fixed the data by which the selection of those within twenty miles could be made.

We say a railroad company claiming under a subsequent grant would take with notice of the law granting to our company, and could not, as against it, acquire title either to the

ten-mile or twenty-mile lands. Such a company would be in the position of a purchaser buying, or a donee receiving a conveyance to lands, with knowledge that the grantor had previously conveyed, or contracted to convey, the lands to another. It is a familiar rule of equity, that if one purchases land with knowledge that there is an outstanding agreement on the part of the grantor to convey to another, he stands in the shoes of the grantor, and holds the lands in trust for the first purchaser, and can be compelled to convey. So if the Kansas Pacific Co. had acquired the title to these lands, and there were no other out of which the Santa Fé could get its lieu lands, the Kansas Pacific could be compelled by a court of equity to convey to the Santa Fé. How weak, then, is the position of the Kansas Pacific Co., when, as in the case at bar, the Santa Fé has the legal title.

It may be conceded that under the Santa Fé grant the United States reserved the right to sell lands to settlers:

1. Within the ten miles to those settlers acquiring rights between the date of the grant and the location of the road.

2. Within the twenty-mile limits to those settlers acquiring rights prior to the actual selection and certification of the lands by the Secretary of the Interior.

This concession in no way weakens our position that there was no reservation of the right to sell to other railroad companies these lands either within the ten or twenty-mile limits. We invite the special attention of the court to the case of *Missouri, Kansas & Texas Rly. Co. v. Kansas Pacific Rly. Co.*, 97 U. S., pp. 491 to 501, where it was held that under the land grant to the Union Pacific, July 1, 1862, and the amendment thereto of July 2, 1864, there was no reservation allowing the United States to grant the lands to another railroad company. It was conceded in the opinion of the court that the lands granted could be conveyed to settlers between

the date of the grant and the filing of the map marking the location of the road, but they could not be granted to another railroad company. The ruling of the court was, that the spirit of the reservation applied to settlers buying between the grant and the location, but not to other railroads. The court in the case last cited, says, pages 498 and 499: "As "the sections could only be known when the route of the "road was established, which might not be for years, the "Government did not intend to withhold the lands in the "meantime from occupation and sale and thus retard "the settlement of the country, nor to exclude the lands "from appropriation to public uses. And the object of the "reservation was to protect the acquisition of rights in this "way to lands falling within the limits of the grant, and to "exclude from its operation lands specially reserved, and "lands of a special character, such as mineral lands other "than those of iron and coal, the sale of which was seldom "permitted anywhere, and swamp lands. The grant made "was in the nature of a float, and the reservations excluded "only specific tracts, to which certain interests had attached "before the grant had become definite, or which had been "specially withheld from sale for public uses, and tracts hav- "ing a peculiar character, such as swamp lands or mineral "lands, the sale of which was then against the general policy of "the Government. It was not within its language or purpose "to except from its operation any portion of the desiginated "lands for the purpose of aiding in the construction of other "roads." In that case the M. K. & T. R. R. claimed the lands under a subsequent grant, just as the Kansas Pacific claims in this case. The court said: "Upon the principle "already announced, in considering the time when the grant "to the plaintiff took effect, the title of the defendant to the

"lands thus set apart to it, had there been no previous dis-
"position or reservation of them, would have become perfect,
"and by relation have vested from the date of the act. But
"so far as the lands were identical with those covered by the
"previous grant to the plaintiff by the acts of 1862 and 1864,
"the title could not attach, as it had already passed from the
"Government. THE RIGHTS OF THE CONTESTING CORPO-
"RATIONS TO THE DISPUTED TRACTS ARE DETERMINED BY
"THE DATES OF THEIR RESPECTIVE GRANTS, AND NOT BY
"THE DATES OF THE LOCATION OF THEIR RESPECTIVE
"ROADS."

Applying this principle to the Santa Fé grant, and there was no reservation therein of the right to sell or give the lands to another railroad company; hence the Union Pacific could not and did not acquire any title.

Therefore we submit, at the expense of repetition, that according to a true construction, there was no reservation in the Santa Fé grant authorizing Congress to convey any of the lands granted or contracted to be granted, either within the ten or twenty-mile limits, to the Union Pacific Co.

Further, we contend that the Union Pacific grant, according to a true construction thereof, does not attempt in any way to convey any lands previously disposed of by the United States, or to which there was any outstanding lawful claim at law or in equity. In other words, Congress never meant to give the Union Pacific by the grant that which it had previously agreed to give to the State of Kansas for the use of the Santa Fé.

In this way both grants are construed together, and the latter is not held to repeal or modify the former. To allow the Union Pacific grant of 1864 to impinge on the grant of 1863 to Kansas for the Santa Fé, would violate the settled

canons of construction, and impute to the Government the taint of bad faith by way of repudiation. We can say with some degree of confidence, that there is not to be found any case decided by this court, or by any other so far as we know, that allows a subsequent grantee railroad company to come forward and divert a prior grant to a railroad company, on the ground that Congress in making the first grant reserved the right to take it away and give it again to another railroad. The most that has been held by this court is, that between the date of the grant and location and selection, settlers might buy. As to lands in place, settlers may buy between date of grant and location. As to lieu lands, settlers may buy between date of grant and selection. We submit that the case cited from 97 U. S. is conclusive of the case at bar, and on it we confidently rely. We ask special attention to the proposition just presented, inasmuch as it was not suggested to or passed upon by the court below.

II.

We deem it unnecessary to say anything to the court on the proposition that as against the Santa Fé grant, under the facts of this case, the Kansas Pacific can claim nothing by the grant of July 1st, 1862. The lands in question are not within that grant. The act of 1864 cannot be dove-tailed into the act of 1862 so as to cut out our vested rights under the act of 1863. We content ourselves with referring to the opinion of the learned judge who decided the case below, which will be found in printed record, pages 22 and 23. The act of 1864 was an enlarged grant. It expressly says, "And any lands granted by this act, or the act to "which this is an amendment, shall not defeat" etc., "any other lawful claim"—thus showing that lands were granted by this act which were not granted by the act of

1862; that is, the lands within the enlarged limits were for the first time granted by the act of 1864.

A. T. BRITTON,
J. H. McGOWAN,
A. B. BROWNE,
Attorneys for Appellee.

JAMES HAGERMAN, *Of Counsel.*

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 68.

THE KANSAS PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE ATCHISON, TOPEKA, AND SANTA FE RAILROAD COMPANY,
Appellee.

Appeal from the Circuit Court of the United States for the District of Kansas.

BRIEF FOR APPELLEE.

A. T. BRITTON,
J. H. McGOWAN,
A. B. BROWNE,
Att'ys for Appellee.

JAMES HAGERMAN,
Of Counsel.

WASHINGTON:
GIBSON BROS., PRINTERS.
1884.

In the Supreme Court of the United States.

October Term, 1884.

No. 68.

THE KANSAS PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
APPELLEE.

Appeal from the Circuit Court of the United States for the District of Kansas.

BRIEF FOR APPELLEE.

This is a suit in equity brought here on appeal from the decree of the Circuit Court of the United States for the District of Kansas. It involves a determination of the title to about five thousand acres of land situate within the overlapping limits of land grants from the United States for the benefit of the two railway corporations which are parties to this suit.

The case was tried below upon an agreed statement of facts (Record print, pp. 23 to 34, inclusive) which are therein stipulated to be taken as being "all the facts in "the case, without regard to admissions, allegations, and "denials in the pleadings."

The complainant below, the appellant here, claims under

the Act of Congress of July 1, 1862, (Stat., Vol. 12, p. 489,) which, in section 3, granted to the Company organized under its provisions "* * * every alternate section of *pub-* "*lic land*, designated by odd numbers, to the amount of five "alternate sections per mile on each side of said railroad, on "the line thereof, and within the limits of *ten* miles on each "side of said road, *not sold, reserved, or otherwise disposed* "*of by the United States*, and to which a pre-emption or "homestead claim may not have attached, *at the time the* "*line of said road is definitely fixed.*"

The lands in controversy are not situated within such ten-mile limits, but they do fall between the additional fifteen and twenty-five mile limit of withdrawal (article 10, agreed statement, record print, p. 27) provided for by the amendatory act of July 2, 1864. (Stat., Vol. 13, p. 356.) Section 4 of that statute doubled the grant made by the act of 1862, and enlarged its lateral limits from ten to twenty miles, but with the additional limitation that:

"Any lands granted by this act, or the act to which this "is an amendment, shall not defeat or impair any pre-emp-"tion, homestead, swamp land, *or other lawful claim*, *nor* "*include any government reservation*, or mineral lands. * * *"

Section 7 of said act of July 1, 1862, provided:

"That within two years after the passage of this act said "Company shall designate the general route of said road, "as near as may be, and shall file a map of the same in the "Department of the Interior; whereupon the Secretary of "the Interior shall cause the lands within fifteen miles of "said designated route, or routes, to be withdrawn from "pre-emption, private entry, and sale. * * *"

Sec. 5 of the act of July 2, 1864, extended for one year the time for designating said general route and for filing

map of the same, and it was further extended by the act of July 3, 1866, (Stat., Vol. 14, p. 79) to December 1, 1866.

By Article 9 of the agreed statement, (record print, p. 24:)

" On the 10th day of January, 1866, the complainant filed " with the Secretary of the Interior a map of the definite " location of its said railroad, showing by flagstaffs marked " thereon and the certificates and affidavits annexed thereto, " the dates of the actual location of the various parts thereof, " according to and in compliance with the instructions of said " Secretary, and said railroad was definitely located along and " contiguous to the lands in controversy before February 4, " 1865, and upon said location said railroad was afterwards " duly constructed."

By articles 10, 11, 12, and 13 of the agreed statement (record print, p. 25) the complainant's railroad along this located line and within twenty miles of the land in controversy was completed and accepted by the President on or before December 14, 1866, and the President directed patents to be issued to the complainant for the lands inuring to said grant. In November, 1870, complainant tendered the Land Office fees and the costs of survey and requested a patent for the lands in controversy, but after full hearing such request was, March 8, 1872, refused by the Commissioner of the General Land Office, because said lands were *reserved at date of the passage of the granting act to the complainant and at date of the definite location of its road*—Exhibit "A" of agreed statement, (record print, p. 32.) Upon appeal, this decision was affirmed February 12, 1873, by the Secretary of the Interior, (record print, p. 34.) Thereafter the lands were certified to the State of Kansas for the benefit of defendant below, the appellee here, and were duly patented by the State to appellee.

Upon the part of the defendant below, the appelee here,

these material facts are set up in the agreed statement. (Record print, pp. 25 to 28, inclusive.)

An act of Congress, approved March 3, 1863, granted lands to the State of Kansas to aid in the construction of certain railroads, one of which was to extend from the city of Atchison, via Topeka, to the eastern line of Kansas, in the direction Fort Union and Sante Fé, New Mexico. By proper acceptances and by the necessary legislative enactments the appellee—defendant below—became entitled to the benefits of this grant. It granted (Vol. 12, p. 772,)

" every alternate section of land, designated by odd num-
" bers, for ten sections in width on each side of said road.
" But, in case it shall appear that the United States have,
" when the lines or routes of said roads and branches are
" definitely fixed, sold any section or any part thereof,
" granted as aforesaid, or that the right of pre-emption or
" homestead settlement has attached to the same, or that
" the same has been reserved by the United States for any
" purpose whatever, then it shall be the duty of the Secre-
" tary of the Interior to cause to be selected, for the purposes
" aforesaid, from the public lands of the United States
" nearest to tiers of sections above specified, so much land
" in alternate sections or parts of sections, designated by
" odd numbers, as shall be equal to such lands as the United
" States have sold, reserved, or otherwise appropriated, or
" to which the right of pre-emption or homestead settle-
" ments have attached as aforesaid, which lands, thus indi-
" cated by odd numbers and selected by direction of the
" Secretary of the Interior as aforesaid, shall be held by
" the State of Kansas for the use and purpose aforesaid."

By articles 4 and 11 of the agreed statement for defendant, (Record print, pp. 26 and 27,) the lands in controversy were withdrawn from market on account of said act of Con-

gress, approved March 3, 1863. Such withdrawal was by order of the Commissioner of the General Land Office, with the approval of the Secretary of the Interior. It was dated March 19, 1863, and took effect by receipt at the proper local land offices on the 30th day of April, 1863. Its relevant portions were, (Record print, p. 30:)

"The Senators and Representatives in Congress from "Kansas having requested the withdrawal of the lands along "the lines or routes of the railroads and branches provided "for in this act, I enclose a diagram showing the probable "lines of said roads and branches, with the ten-mile limits "on each side, (colored green,) and you are hereby directed "to *withhold from ordinary private sale or location, and* "*also from pre-emption and homestead with the qualifica-* "*tion hereinafter indicated, all the public lands in your dis-* "*trict and lying within the ten-mile limits as designated in* "*said diagram.* Where said limits pass through the sur- "veyed lands, the Register will proceed at once to lay down "in lead pencil on the township plats the ten-mile limits of "the reserve on each side thereof, and make the proper "notes thereon, *showing that the lands embraced within said* "*limits are reserved from sale or entry*, and as the surveys "progressed and the township plats are received he will pro- "ceed in like manner to lay down the limits of reservation "and make similar notes, and immediately report same to "this office, so that this order may be strictly observed by "withholding the lands in said limits."

And upon Record print, p. 31:

"You will therefore understand from the foregoing:— "1. *That the odd sections within the limits of the said rail-* "*roads and branches are absolutely withdrawn from sale,* "*pre-emption, or homestead entry*, except so far as inceptive "rights may have accrued prior to the receipt by you of "this order."

By article 5 of agreed statement for defendant, (Record

print, p. 26,) the defendant below, the appellee here, *on the 1st day of January*, 1866, "caused a map or profile of its "road, or definite location, from Topeka to Emporia, and "adjacent to and within twenty miles of all of said lands "in controversy, to be filed as required by law, duly au- "thenticated and certified to."

By article 13 of agreed statement for defendant, (Record print, p. 27,) it appears that in 1868 and in 1870 (the last date being subsequent to the construction of the road) other maps were filed to show a slight deflection of the constructed road from the line of definite location, but that each of said designated routes, as well as the constructed road, were within twenty miles of the lands in controversy.

By article 12, agreed statement for defendant, (Record print, p. 27,) the defendant's road was completed and accepted within the time limited by the act of March 3, 1863, and by articles 7, 8, and 9 (Record print, p. 26) the lands in controversy were certified by the Secretary of the Interior to the State of Kansas for the benefit of defendant below, the appellee here, and by said State were thereafter duly patented to said appellee.

Thereupon the complainant below, the appellant here, filed his suit in equity in the Circuit Court of the United States for the District of Kansas, asking a decree that the lands should have been patented by the United States to the complainant, and that the defendant took the title in trust, and should be required to convey same to complainant.

The Court below dismissed the bill.

ARGUMENT.

This being a bill, filed by the complainant, the appellant here, to have a trust declared and to compel a conveyance,

it is first necessary for appellant to establish in itself such an equitable right to the demanded premises as would give it the title if the patent of appellee was out of the way. If, upon the agreed facts, the grant by Congress to complainant never attached to the lands in controversy, the judgment below must for that reason be affirmed. The value of respondent's title would not then be in anywise material.

In the Mo., &c., Co. *vs.* Kansas Pacific Railway Co. (97 U. S., 498) this Court determined *when* and to *what* the 1864 Congressional grant of lands to complainant attached:

" Our judgment is that the title of the plaintiff, attaching " to the lands in controversey by a location of the route of " the road, being followed by a construction of the road, " took effect by relation, *as of the date of the act of* 1862, " *so as to cut off all intervening claimants, except in the* " *cases where reservations were made in that act, and the* " *amendatory act of* 1864. Such reservations operated as " limitations upon the grant. The limitations upon the grant " in the act of July, 1862, extended to lands sold, *reserved*, " *or otherwise disposed of by the United States*, or to which " a pre-emption or homestead claim had attached, and to " mineral lands. The amendatory act of July, 1864, de- " clared that neither that nor the original act should defeat " or impair any pre-emption, homestead, swamp land, *or* " *other lawful claim, or include reservations*, or mineral " lands other than those of iron or coal."

Under this settled construction of complainant's title, the primary question in present case is:

Did the Executive order of withdrawal of March 19, 1863, *and which took effect April* 30, 1863, *except the lands in controversy out of the operation of the grant of* 1864 *to the complainant?*

The lands were admittedly included in the geographical limits of said withdrawal, and the order has never been modified nor rescinded. (Article 4 of the agreed statement

for defendant's acts, record print p. 26.) *As matter of fact* they were, and have been, within the withdrawal, and unless *as matter of law* they were excluded therefrom, they must be held to have been reserved within the meaning of the act of 1864.

Appellant contends that the withdrawal of 1863 was inoperative to exclude the lands therein from the subsequent act of 1864, because:

"1st. Said order of withdrawal was improvidently made, "and, being directly in the face of the statute, was abso- "lutely void, and that qualified parties, desiring to make "entry of these lands under the homestead and pre-emption "laws, could compel the General Land Office to admit their "entries, notwithstanding the order."

2d. The title of the Kansas Pacific to *granted* lands under the act of July 2, 1864, was prior and superior to the title of the appellee to *indemnity* lands under the act of March 3, 1863.

In stating and discussing these two propositions, our order of statement is the reverse of that adopted by counsel for appellant in his printed argument. We do so, because, as afore suggested, if the withdrawal reserves the lands from the grant of 1864 to appellant, the validity of appellee's title will not be properly in issue.

I.

DID THE WITHDRAWAL OF 1863 OPERATE AS A RESERVATION OF THESE LANDS WITHIN THE MEANING OF THE GRANT OF 1864?

The entire argument of appellant is based upon the theory that, assuming the lands in controversy to have been vacant public lands, if the act of March 3, 1863, did not convey or grant the lands in controversy to the State of Kansas, to the exclusion of the acquisition of right in appel-

lant under the acts of 1862 and 1864, that, *therefore*, there could be no reservation of them within the meaning of the limitations of the acts of 1862 and 1864. In other words, the withdrawal is void and inoperative as a reservation from or limitation upon the Kansas Pacific grant, unless the appellee can show the prior and superior *title* to lands embraced therein.

Non constat. The order of withdrawal was not necessarily based upon the right of appellee to the land. Such a reservation is simply an order of the Executive Department *withholding* the lands from sale or entry. It is a separation of them from the body of the public lands, in such manner and with such effect that they would not be subject to appropriation under any subsequent law, or proclamation, or sale. The *object* of the Executive officers in making the order may have been, as it doubtless was in this instance, to prevent anticipatory appropriations of the lands supposed to have been granted by the act of 1863; *but the reservation itself conveyed to no one any right, interest, or equity in the land.* It simply prevented, as to the withdrawn lands, the acquisition of any such right, interest, or equity by any other party than the grantee under the act of March 3, 1863; but it neither made a title to such grantee, or determined in any wise that he had, or would have, such title from other sources. The question of the reservation is, then, a simple matter of fact, the extent of which is to be determined by the language of the departmental order of withdrawal, and all inquiry as to what actually passed by the grant of 1863 becomes wholly immaterial. The question, and the only practicable question in the case, is whether this reservation, by order of the officers of the Land Department, existing and unrescinded at the date of the act of July 2, 1864, and, whether provident or improvident, did not exclude the lands embraced

therein from the subsequent grant to the Kansas Pacific Railway Company?

Suppose that we assume, *pro argumento*, that the State of Kansas and its grantee could take nothing under the act of 1863. Does that obliterate the *fact* of the reservation under the order of March 19, 1863? Does it in anywise change the legal *effect* of that order as against subsequent grantees from the United States?

Of course we are not arguing that an improvident withdrawal by the Land Department would impair the *power* of Congress to grant the lands embraced therein. Our contention is simply, that the intention of Congress to exercise that power would not be presumed from a statute which expressly excluded reserved lands from its operations, nor even from an act, which, without such express terms of limitation, only purported to grant "public lands." As matter of public policy, or of sound construction of law, the executive officers may have erred in the creation of a reservation, or if providently created, the object of its creation may ultimately fail. But neither contingency changes the *fact* of the reservation, nor its effect as a limitation upon subsequent grants of the character and language of that to the appellant in this case.

The principle involved has been so repeatedly adjudicated that a citation of authorities would seem to be superfluous. But as it is the pivotal point of the case, and as it is pressed in the brief of appellant's counsel, we collate the decisions for the convenience of the court.

In Chotard *vs.* Pope, 12 Wheat., 586, it was held that from an act of Congress granting to the legal representatives of Henry Willis the right "to enter, without pay-"ment, in lieu, &c., in any land office, &c., in the States "of Mississippi or Alabama, &c., a quantity of land not

" exceeding thirteen hundred acres," &c., there was necessarily excluded—

"All lands previously appropriated, whether by public " sale or by being withdrawn from the mass of lands of- " fered for sale. From the earliest date of the legislation " of Congress on this subject there have been appropriations " to the public use, made by withdrawing from this mass " certain portions of territory for public seminaries, towns, " salt springs, mines, and other objects; and the particular " land in controversy was appropriated under a previous " law, viz., the act of April, 1820, for the site of a town. " We therefore think that it was not included in the right " to appropriate vested in the complainants under the act " on which they rely."

In Wilcox *vs.* Jackson (13 Pet., 400) the President had proclaimed for sale certain lands without excepting therefrom a military reservation. The proclamation was based on an act of Congress supposed to authorize it, but this Court held that the act did not apply, and then added:

"But we go further, and say that whensoever a tract of " land should have been legally appropriated to any pur- " pose, from that moment the land thus appropriated be- " comes severed from the mass of public lands, and that no " subsequent law, proclamation, or sale would be construed " to embrace or operate upon it, although no reservation " were made of it."

In Kissell *vs.* St. Louis Public Schools (18 How., 27) an act of Congress of 1812 had reserved certain lands for the support of schools, and such lands were also within the limits of the town of St. Louis. It was held that for both reasons the land was not subject to pre-emption entry, and the effect of an Executive reservation was incidentally discussed, viz:

"Nor could Duncan be heard to say that he did not know "that this parcel of land was reserved. The same excuse "might be made, and with a much greater claim to justice "and propriety, by one who obtained an entry on land re- "served from sale for military purposes, or for some other "public use by the President, the fact of which reservation "was hardly known beyond the General and Local Land "Offices; yet such entries have constantly been set aside as "absolutely void or as voidable by the Department of Pub- "lic Lands."

In Litchfield *vs.* The Dubuque & Pacific R.R. Co., (23 How., 66,) this Court expressly decided that the Act of Congress of 1846 conveyed to the State of Iowa no lands north of the Raccoon Fork of the Des Moines River; but, subsequently, when the question was made in Wolcott *vs.* The Des Moines Navigation & R.R. Co. (5 Wall., 681) as to whether or not those lands had been reserved by the Department within the meaning of the exceptions in the railroad grant of 1856, this Court further decided that, notwithstanding the grant of 1846 did not extend above said Raccoon Fork, *yet, nevertheless, the reservation extended to the lands withdrawn for the protection of that supposed grant.* And in reply to the argument that such an executive withdrawal was not by competent authority, and, hence, that the reservation was nugatory, the Court said:

"Besides, if this power was not competent, which we "think it was ever since the establishment of the Land De- "partment, and which has been exercised down to the pres- "ent time. * * *"

In a series of subsequent cases relating to these Des Moines lands, this Court affirmed and reaffirmed this decision, decisively answering every form of ingenious argument, predicated upon verbal criticisms or supposed distinctions in

the facts of reservation, or in the meaning of excepting clauses.

Des Moines Navigation Co. *vs.* Burr, 5 Wall., 681.
Hannah Riley *vs.* W. B. Wells, (unreported,) October Term, 1869.
Williams *vs.* Baker, 17 Wall., 144.
Homestead Co. *vs.* Valley R.R. Co., 17 Wall., 153.
Wolsey *vs.* Chapman, 101 U. S., 768.
Dubuque R.R. Co. *vs.* D. M. V. R.R. Co., 109 U. S., 320.

In Grisar *vs.* McDowell, (6 Wall, 381,) it was objected that certain lands reserved for military purposes by an order of the President "could only be reserved from sale and set "apart for public purposes under the direct sanction of an "Act of Congress," to which this Court answered:

"From an early period in the history of the Government, "it has been the practice of the President to order, from "time to time, as the exigencies of the public service re- "quired, parcels of land belonging to the United States to "be reserved from sale and set apart for public uses.

"The authority of the President in this respect is recog- "nized in numerous acts of Congress. Thus, in the pre- "emption act of May 29, 1830, it is provided that the right "of pre-emption contemplated by the act shall, not extend "'to any land which is reserved from sale by act of Con- "'gress, or which may have been appropriated for any pur- "'pose whatever.'"

The decision also cites the act of Sept. 4, 1842, and the California act of March 3, 1853, and concludes that—

"*The provisions in the acts of* 1830 *and* 1841 *show very "clearly that by 'competent authority' is meant the author- "ity of the President and officers acting under his direc- "tion.*"

In connection with this decision, we call the attention of

the Court to the act of March 27, 1854, (10 Stat., 269,) which expressly recognizes the withdrawal of lands (as in present case) in consequence of *proposed* railroads by providing—

"That every settler on public lands *which have been or* "*may be withdrawn from market in consequence of pro-*"*posed railroads*," &c.

This act was an affirmance by Congress of such prospective withdrawals in the past and a distinct recognition of the power to make them in the future. This general statute has never been modified nor repealed.

It is proper to remark that the power has been frequently exercised by the Land Department, both before the enactment of the granting acts as well as after such enactment, but prior to location. This is illustrated by the following table, the data for which is of public record in the General Land Office:

	Date of grant.	Date of withdrawal.
Illinois	Sept. 20, 1850	Sept. 19, 1850
Missouri	June 10, 1852	June 11, 1852
"	Feb'y 9, 1853	May 19, 1853
Iowa	May 15, 1856	May 10, 1856
Florida	May 17, 1856	May 17, 1856
Louisiana	June 3, 1856	May 31, 1856
Alabama	June 3, 1856	June 19, 1856
Wisconsin	June 3, 1856	May 29, 1856
Michigan	June 3, 1856	May 30, 1856
Mississippi	Aug. 11, 1856	Aug. 9, 1856
Kansas	Mar. 3, 1863	Mar. 19, 1863

In Mo., &c., R'y Co. *vs.* Kas. Pac. R'y Co., (97 U. S., 498,) this Court construed the grant under which appellant derives his claim of title, and held that—

"The grant made was in the nature of a float, and the "reservations excluded only specific tracts, to which certain

" interests had attached before the grant had become defi-
" nite, *or which had been specially withheld from sale for*
" *public uses*, and tracts having a peculiar character, such as
" swamp lands or mineral lands, the sale of which was then
" against the general policy of the Government."

In L., L. & G. R.R. Co. *vs.* U. S., (92 U. S., 733,) this Court held that the act of March 3, 1863 (the grant under which appellee derives title) did not embrace tracts reserved by competent authority for any purpose or in any manner, *although no exception of them was made in the grants themselves;* and a grant by Congress of every alternate section of " land " was restricted to such whereto the complete title was absolutely vested in the United States. The general doctrine of reservation as affecting Congressional grants of land is fully discussed in that decision, which is, however, too familiar to this Court to justify our repetition *in extenso*.

In Newhall *vs.* Sanger, (92 U. S., 761,) this Court construed the meaning and effect of both the granting and the limitation clauses of the acts of 1862 and 1864, under which appellant claims title, and applied to those grants the doctrine of the L., L. & G. case, *supra*. It was therein held that:

" The words 'public lands' are habitually used in our
" legislation to describe such as are subject to sale or other
" disposal under general laws. That they were so employed
" in this instance is evident from the fact that to them
" alone could the order withdrawing lands from pre-emp-
" tion, private entry, and sale apply."

And the fact that a claim to a Mexican grant was *sub judice* at time of the withdrawal for the railroad grant under acts of 1862 and 1864, although said claim was subsequently adjudicated to be fraudulent, was decided to exclude the lands embraced therein from the grant to the Railroad Company.

Counsel for appellants attempts to distinguish the case at bar from this uniform line of decisions. Upon page 27 of his printed brief he claims that the Departmental order of withdrawal was not competent authority, and that "no matter "what the Secretary or the Commissioner did, they were "not the United States."

But the cases and laws cited establish that an order of the President reserving lands is "competent authority," and, as was said in Wolsey *vs.* Chapman, *supra*—

"It follows necessarily from the decision in Wilcox *vs.* "Jackson that such an order sent out from the appropriate "executive department in the regular course of business is "the legal equivalent of the President's own order to the "same effect."

And to the verbal criticism that the lands withdrawn in this case were not reserved by "the United States," the L., L. & G. case, *supra*, holds a similar contention to be unsound, and decides broadly that—

"Every tract set apart for special uses is reserved to the "Government to enable it to enforce them."

Counsel for appellant further contends that the doctrine of Wolcutt *vs.* Des Moines Co. is inapplicable to the case at bar, because decision in the Wolcutt case was based upon the peculiar phraseology of the proviso to the act of 1856, in connection with the fact that Congress used that language with special reference to the previous withdrawal for the Des Moines River grant. But all the reason of that contention was fully disposed of by this Court in Wolsey *vs.* Chapman, *supra*. In that case counsel attempted to destroy the applicability of the Wolcutt case, by drawing a similar distinction between the language of the reservation by the act of 1856 and the language of the reservations prescribed

by the 10th section of the act of 1841 granting pre-emption rights, and the 8th section granting lands to the States for internal improvements. But this Court said:

"We do not so understand the effect of those decisions. "Whatever might be the force of such an argument, if the "cases involving the act of 1856 stood alone, it seems to us "impossible to distinguish the question now presented from "that disposed of in Riley *vs.* Wells. In that case the lan- "guage under consideration was 'lands included in any "'reservation by any treaty, law, or proclamation of the "'President of the United States, or reserved for salines "'or for other purposes;' and in this, 'any public land, ex- "'cept such as is or may be reserved from sale by any law "'of Congress, or proclamation of the President of the "'United States.' In the act of 1856 the corresponding "language is: 'Any and all lands heretofore reserved to "'the United States by any act of Congress, or in any "'other manner by competent authority, for the purpose of "'aiding in any object of internal improvement, or for any "'other purpose whatever.'

"It is conceded that the lands in controversy were act- "ually reserved from sale by competent authority when "the selection was made under the act of 1841. They were "reserved, also, in consequence of the act of 1846. *The "proper executive department of the Government had deter- "mined that, because of doubts about the extent and opera- "tion of that act*, nothing should be done to impair the "rights of the State above the Raccoon Fork until the dif- "ferences were settled, either by Congress or judicial deci- "sion. *For that purpose an authoritative order was issued, "directing the local land officers to withhold all the disputed "lands from sale.* This withdrew the lands from private "entry, and, as we held in Riley *vs.* Wells, was sufficient to "defeat a settlement for the purpose of pre-emption while "the order was in force, notwithstanding it was afterwards "found that the law, by reason of which this action was "taken, did not contemplate such a withdrawal."

And the Court, ruling that the withdrawal by the Secre-

tary of the Interior was in law the act of the President and operated to lawfully reserve the lands, held same to be excluded from the grant to the State.

Counsel for appellant appears to deduce a distinction in legal effect from the fact that the withdrawal treated those lands as granted, whereas they subsequently proved to be inemnity. But this comes within the rule heretofore demonsrated, that an error of judgment in ordering withdrawal would not change the fact of withdrawal nor its legal effect to reserve lands. And, furthermore, it is a sound agument to insist, that the lands having been withdrawn as *granted* by the act of March 3, 1863, and so standing of record at date of the act of July 2, 1864, are to be treated as *granted* for all the purposes of such later act.

We, therefore, submit that both because the grant to the appellant was in terms restricted to "public lands," and because the lands in controversy were reserved by the executive withdrawal of April 30, 1863, within the meaning of the limitations upon the grant of 1862 and 1864, the claim of appellant must be rejected. Such claim is *per se* invalid and without legal or equitable basis. It should be rejected without reference to the merits or the title of appellee.

II.

IF THE WITHDRAWAL OF 1863 DID NOT EXCEPT THESE LANDS FROM THE GRANT OF 1864, THEN WHAT IS THE RELATIVE VALUE OF THE TITLES EXHIBITED IN THIS CASE?

As heretofore suggested, this inquiry is immaterial if the withdrawal of 1863 is held to be a reservation within the meaning of the acts of 1862 and 1864. We discuss it from abundant caution, and because it constitutes such considerable part of the brief for appellant.

The lands in controversy are within the 20-mile limits of

the located and constructed lines of each of the contesting roads. (Article 10, Agreed Statement, Record print, p. 27.)

Hence they are claimed by the Kansas Pacific as *granted* lands under the enlarging act of 1864; but the legal title has been duly conveyed by the United States through the State of Kansas to the Atchison, Topeka & Santa Fé as *indemnity* lands enuring under the act of March 3, 1863.

If we understand correctly the printed brief of appellant, his contention may be thus summarized:

That the grant to appellant of the lands in controversy attached *on the passage* of the act of July 2, 1864, and upon authority of Van Wyck *vs.* Knevals, (106 U. S., 360,) the lands were, by operation of law, reserved *at that date*, no matter whether or not the Land Department made further order of withdrawal. That the grant of indemnity to the appellee was not a grant *in præsenti*, and that until a loss in the primary limits was ascertained, and the indemnity therefor actually selected out of the lands in controversy, such lands would not be covered by nor in any way be affected by the act of March 3, 1863. Then, upon the assumption that such identification was subsequent to the act of July 2, 1864, a priority of right in appellant is asserted.

But this Court has heretofore conclusively settled both *when* and to *what* the right to such *granted* lands, or lands in place attaches, and its decisions differ somewhat from the statement of counsel. In Van Wyck *vs.* Knevals, (*supra*,) it was held, as to *granted* lands, that when the route of the road was "definitely fixed" the grant took effect, by relation as of the date of the act of Congress, so as to cut off "all claims, *other than those mentioned*, to any portion of "the lands from the date of the act, and passes the title as fully "as though the sections had been capable of identification." And this Court therein further held that the route must be

considered as "definitely fixed" when "*a route is adopted* " *by the Company, and a map designating it is filed with* " *the Secretary of the Interior and accepted by that officer.*"

And in Mo., &c., R'y Co. *vs.* Kan. Pac. R'y Co., (97 U. S., 498,) it was held that the grant to appellant "attaching to " the lands in controversy *by a location of the route of the* " *road*, being followed by a construction of the road, *took* " *effect by the relation of the act of* 1862, so as to cut off all " intervening claimants, except in cases where reservations " were specially made in that act, and the amendatory act " of 1864. *Such reservations operated as limitations upon the grant.*"

The language used in this decision, such as "location of " the route of the road," "before the grant had become " definite," and similar phraseology must be read as identical or synonymous with the words "definitely fixed" in the Van Wyck *vs.* Knevals case, because the limitations upon the Kansas Pacific grant were by section 3, act July 1, 1862, "at the time the line of said road is *definitely fixed*," and section 7 prescribed that the Company within a stipulated time "shall designate the general route of said road, " as near as may be, and shall file a map of the same in the " Department of the Interior, *whereupon* the Secretary of " the Interior shall cause the lands within fifteen miles of " said designated route or routes to be withdrawn from pre- " emption, private entry, and sale."

At the last term of this Court, in Cedar Rapids, &c., Railroad *vs.* Herring, (110 U. S., 38,) it was said:

"In the case of Van Wyck *vs.* Knevals, (106 U. S., " 360,) the subject is discussed with exclusive refer- " ence to the odd-numbered sections specifically granted, " and it is there held that the adoption by the Company of " the surveyed line of the route of the road *and the filing* " *of the map of the same with the Secretary of the Interior*, " cuts off the right of entry of these odd sections by any

" one else, whether there is a proclamation or order with-
" drawing them or not."

It follows that the time up to which the limitations upon the acts of 1862 and 1864 should be operative was not the date of the passage of these acts, as stated by counsel for appellant, but it was the date when the route of the road " was definitely fixed."

It further follows that such route was not " definitely " fixed " by the location upon the ground in February, 1865, as contended in the brief for appellant, but it was so definitely fixed when a map of such location upon the ground was filed with the Secretary of the Interior. By article 9 of the agreed statement, (record print, p. 24,) such map of definite location of the appellant road was filed with the Secretary of the Interior January 10, 1866.

Upon the agreed statement and for the purposes of this case, then, January 10, 1866, must be accepted as the date up to which the limitations upon the acts of 1862 and 1864 continued to be operative.

The inquiry then is, whether at that date any of such limitations were applicable to the lands in controvery? Sec. 3, Act July 1, 1862, grants lands " not * * * " otherwise disposed of * * * at the time the line of " said road is definitely fixed."

And sec. 4, act July 2, 1864, makes the further limitation:

" And any lands granted by this act, or the act to which " this is an amendment, shall not defeat or impair any * * * * other lawful claim." * *

If, then the, question of reservation is eliminated from the case, the contention is that through the intervening act of March 3, 1863, and through the intervening definite

fixing of the route of the road therein provided for, the lands in controversy were "otherwise disposed of," and were included in "other lawful claims" at date above specified, viz., January 10, 1866. It is conceded that these are indemnity lands under said act of March 3, 1863, and this branch of the case must be determined by the *time* when such right to indemnity so vested in appellee as to appropriate the lands against other grantees from the United States. If prior to the aforesaid filing by appellant of map of located route, viz., January 10, 1866, then the lands were so "otherwise disposed of," and so included in "other lawful claims," as to be excluded from 1864 grant to appellant.

By article 5 agreed statement, (Record print, p. 26,) it is stipulated:

"That on the 1*st day of January*, 1866, the said defend-"ant" (the appellee here) "caused a map or profile of its "road or definite location from Topeka to Emporia, and "adjacent to and within twenty miles of all of said lands "in controversy to be filed, as *required by law, duly authen-"ticated and certified to.*"

The route of the Atchison, Topeka & Santa Fé road was, therefore, "definitely fixed" ten days prior to the time, when, as per agreed statement of facts, (Article 9, p. 24,) the route of the Kansas Pacific was "definitely fixed." The deficiency in the grant in place to appellee *then* existed, and, being apparent of record, was *then* capable of ascertainment. The right of appellee to indemnity, which right existed by virtue of its grant, *then* became fixed and certain, and could not be made uncertain nor be divested by or through the subsequent location of appellant.

It is quite immaterial whether our grant as to the indemnity is *in præsenti*, or only a contract to convey. In either case, we have clear priority of right, and, as was said

by Chief-Justice Marshall in Fletcher *vs.* Peck, (6 Cranch, 87 :)

" A contract executed, as well as one which is executory, " contains obligations binding on the parties. A grant in " its very nature amounts to an extinguishment of the " rights of the grantor, and implies a contract not to reas- " sert that right."

We do, however, insist that a sound construction must treat our grant as an entirety. It is not severable into two parts, one of which shall be a present grant, the other not. It is a grant of *quantity*. We are to have ten sections of land for every mile of road constructed if that quantity of vacant land can be found within either the primary or secondary limits prescribed. We *must* take such quantity within the primary limits, if same exists therein; but if not, we can resort to the secondary limits for so much land " *as shall be equal to* " the deficiency. The one is as clearly a present grant as the other. The only thing which is left uncertain by the granting act is the *identification* of the sections granted, but through all the decisions of this Court, upon which a difference is claimed as to the character of grants to lands in place and to indemnity lands, the distinction made is simply one of *identification*.

Whenever the lands, whether in place or as indemnity, have been properly identified, the decisions have been uniform that the *grant* thereto at once attached and took effect by relation as of the date of the granting act, subject only to the exceptions named therein; and certainly the location of the route of the road just as precisely and conclusively fixed the locus of the odd sections within the secondary as within the primary belts, from both of which the *entire grant* was to be satisfied.

We are not unmindful of the decisions of this Court in

Ryan *vs.* R.R. Co., (99 U. S., 386,) which determined that exceptions to the granting act (as, for instance, reserved lands) must be tested in matter of indemnity lands by the character thereof at date of *selection;* nor of the decision in Cedar Bapids, &c., Railroad *vs.* Herring, (110 U. S., 27,) which held that the right to select indemnity did not accrue until the line of the road had been established and filed in the Land Department. In both of these cases the doctrine seems to be that as all the indemnity belt might not be required to satisfy losses, selection is requisite to determine the particular sections to which the grant should attach. In other words, *all* the odd sections within the indemnity belt would be identified by the definite location of the road as perfectly as all odd sections within the belt of lands in place would be similarly identified by such location; but as examination would be requisite to determine what odd sections in place were vacant and subject to grant, so the same character of investigation would determine how much loss had occurred, and which of the indemnity sections should be taken to supply it. There would thus result, at most, different modes of identifying, and, by successive steps, the whole of the lands *granted.*

But, if in the cases cited it was intended to decide that upon filing of definite location, no such right in the indemnity belt vested as to *per se* withhold such lands from subsequent claim of third parties, but that same were subject to general sale and disposal until selection, we should still insist that such doctrine is inapplicable to our grant, and for this obvious reason. In the Ryan case, the grant being to the Company direct, the act of July 25, 1866, required that the indemnity selections "*shall be selected by said compa-*" *nies in lieu thereof;*" and in the Cedar Rapids case, the grant being to the State of Iowa, the act of May 15, 1858, provided in case of prescribed loss of lands in place, that

" then it shall be lawful for any agent or agents to be ap-
" pointed by the Governor of said State to select other
" lands." Thus in both cases it was made the duty of the grantee to not only mark out by definite location his primary and his secondary limits, but also to identify by subsequent selection the particular parts of such secondary limits needed to supply deficiencies in the primary limits. In such case there is a manifest propriety in saying that the matter, both of location and selection, was within control of the grantee, and that its failure to take seasonable action would subject it to loss by intervening sales of the lands.

But in case of appellee the facts are so dissimilar that the same reasoning would not apply. The act of March 3, 1863, provides that in case of loss of lands in place when the route of the road is definitely fixed " then it shall be the duty of " the *Secretary of the Interior* to cause to be selected," &c. So that the last act of identification imposed by the statute upon the grantee is the filing of its definite location. *Thereafter* the ascertainment of losses in place and satisfaction thereof from the indemnity belt is vested in the grantor through its executive department. Could it be fairly contended that after the grantee had done all that he could do under the statute in the way of identification, his right could be defeated by the failure of the Secretary of the Interior to act? Many of these grants made it the duty of the Secretary of the Interior to withdraw *all* of the lands upon filing of definite location; would his failure to do so destroy the right of the grantee to indemnity any more than to lands in place? And even if there is no express direction in the statute to so withdraw upon filing of definite location, yet is not the right of the grantee the same? Is there not an equal duty to protect his entire limits, both primary and secondary, from subsequent sale or disposal? Was not the purpose of any withdrawal under the statute to prevent

waste of the lands granted, and was not that equally applicable to both limits, from one or the other of which the *whole* grant was to be satisfied. The contract was for a certain number of sections, be they within one or both limits. Why, then, are not both limits equally appropriated by the law? Must the right of a grantee to the primary limits become fixed and certain, but his right to the preservation of the secondary limits *for the purposes of his grant* depend upon the will of the Secretary of the Interior in ordering a withdrawal? In short, must his right depend upon the *chance* of an executive withdrawal and not upon the *grant* of the act of Congress?

In his printed brief (p. 9) counsel for appellant recites that "when the line of defendant's railroad was definitely "fixed, which, according to article 13, was some time in "1870." Counsel has therein inadvertently mistaken the stipulation, or has misapprehended the effect thereof. By article 5, (Record print, p 20,) *January* 1, 1866, is stipulated to have been the date when the map of definite location of defendant was filed, "as required by law, duly authenticated "and certified to." That language is broad enough to cover everything requisite to make such filing legal and conclusive. The subsequent statements in article 13 (p. 27) fairly construed, relate to and cover only deflections in actual construction from such located line. They were agreed to be slight, the maximum variation being one mile; and the lands in controversy were within twenty miles of all said routes, whether of location or of construction. That creates no state of facts of which appellant can take advantage, because, as was said in Van Wyck *vs.* Knevals, (106 U. S., 369:)

"As to the alleged deviation of the road constructed "from the route laid down in the map, admitting such to "be the fact, the defendant is in no position to complain of

" it; the lands in controversy are within the required limit,
" whether that be measured from one line or the other. A
" deviation of the route without the consent of Congress, so
" as to take the road beyond the lands granted, might per-
" haps raise the question whether the grant was not aban-
" doned; but no such question is here presented. The devi-
" ation within the limits of the granted lands in no way
" inpinged upon any rights of the defendant."

A. T. BRITTON,
J. H. McGOWAN,
A. B. BROWNE,
Att'ys for Appellee.

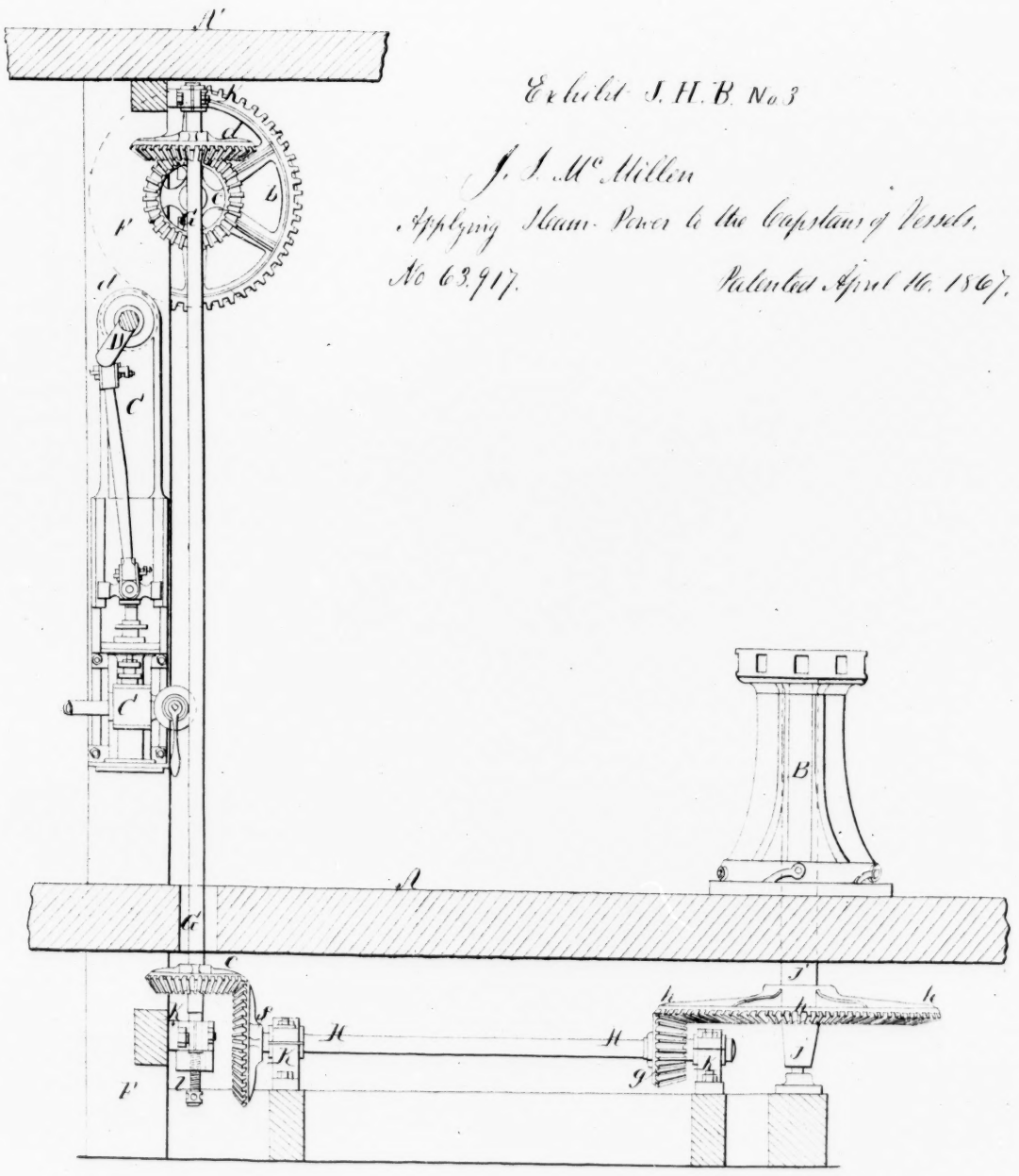
JAMES HAGERMAN,
of Counsel.

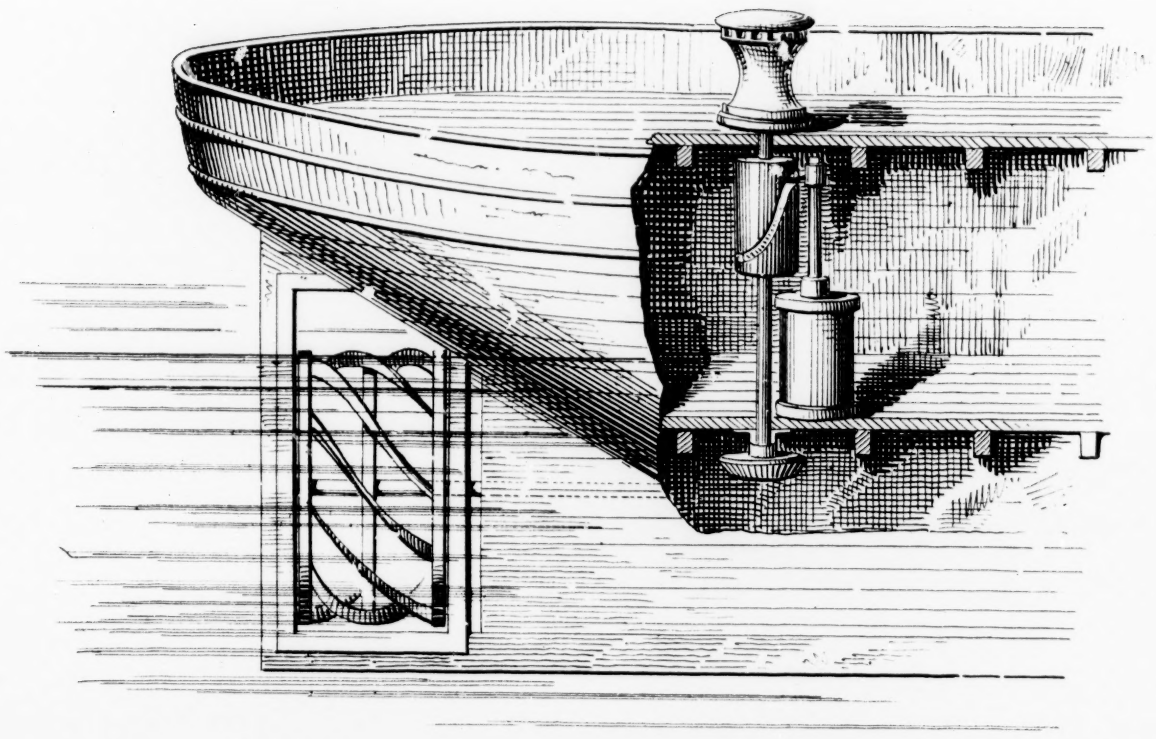
Exhibit J. H. B. No 3

J. J. McMillen

Applying Steam Power to the Capstans of Vessels.

No 63,917. Patented April 16. 1867.





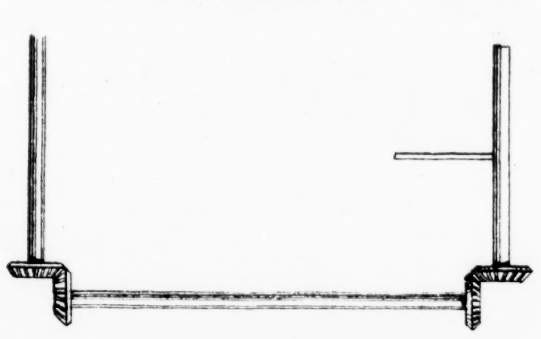
Emerson Capstan.

1834.

Miscellaneous Devices.

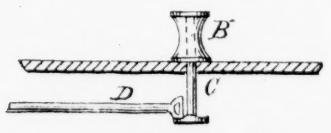
1846.

Carmichael Patent 1846.



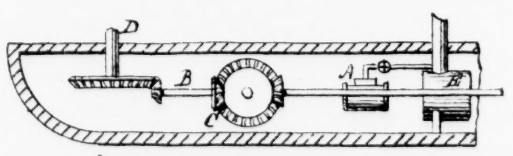
Shafting in common use in mills &c. for many years.

Robinson's Patent 1842.



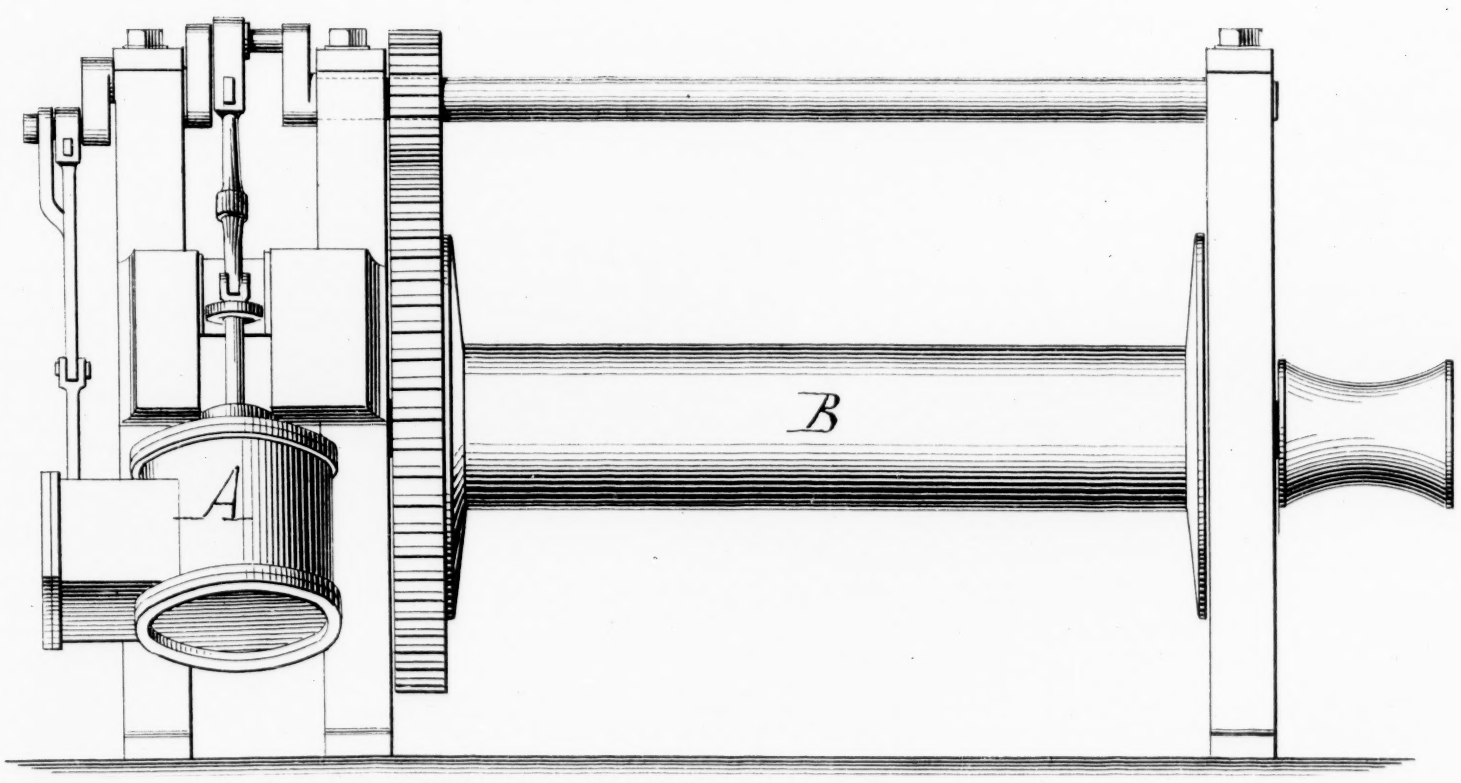
B. Capstan.
C. Capstan spindle
D Shaft running aft

Dingler Device. 1844.



A. Engine
B. Shaft
C. Gear wheels
D. Spindle
E. Boiler

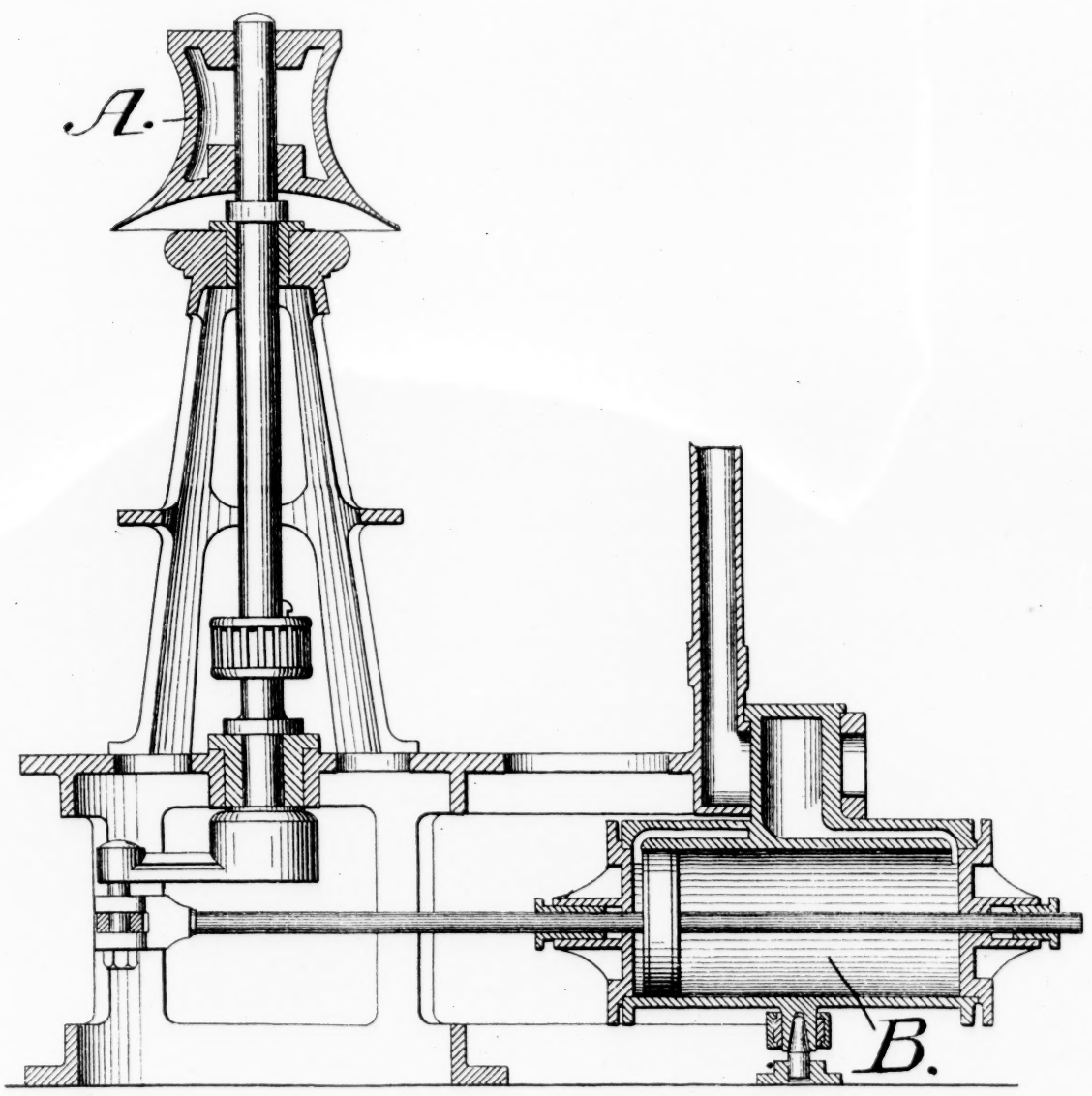
Walker Windlass . 1846.



A . . . Auxiliary Engine B . . Windlass.

Used on Steamer Walker forward of the Boilers 1846.

French Capstan. 1848.



A. Capstan. *B. Engine*

Described in Publication Industrielle.
Paris, 1848. FIG. 1. PLATE 1.1. —
— VOL-6 *of Plates.*

51

No. 347
Mahn
v.
Harwood et al

Pages 131.

JAMES H. OSGOOD.

Mode of Covering Rounded Articles with Leather

No. 127,098. Patented May 21, 1872.

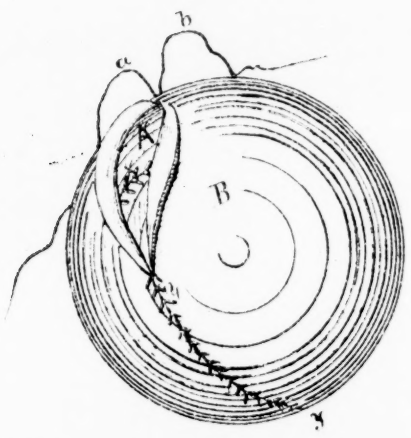


Fig. 1.

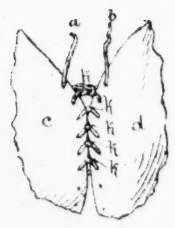


Fig. 2.

Witnesses:
E. H. Mahn
Wm. Thos. Clarke

James H. Osgood

[6]

J. H. OSGOOD.

COVERING ROUNDED ARTICLES WITH LEATHER.

No. 7,046. Reissued April 11, 1876.

No. 347
Mahn
v.
Harwood et al
} Page 134.

Fig. 1.

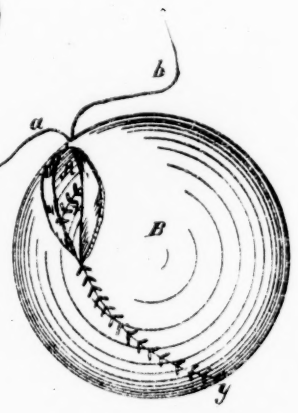


Fig. 2.



WITNESSES
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F. O. McCleary.

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By Legget & Legget
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